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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 8865-03

G. D. NEWHALL, APPELLANT,

vs.

CHARLES W. SANGER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED 15th March 1875

SUPREME COURT OF THE UNITED STATES.

No. 806

G. D. NEWHALL, APPELLANT,

vs.

CHARLES W. SANGER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 *Bill in Equity.*

In the Circuit Court of the United States for the District of California. Ninth Circuit.

To the honorable judges of the Circuit Court of the United States for the District of California:

Charles W. Sanger, resident of the city of Philadelphia, and citizen of the State of Pennsylvania, brings this bill against G. D. Newhall, resident of the city and county of San Francisco, and citizen of the State of California, and thereupon your orator complains and says: That under and by virtue of an act of the Congress of the United States of America, approved July 1, 1862, entitled "An act to aid in the con- "struction of a railroad and telegraph line from the Missouri river to "the Pacific ocean, and to secure to the government the use of the same "for postal, military, and other purposes;" and of an act amendatory thereof, approved 2 July, 1864, and amendatory of said two acts, approved 3rd March, 1865, and a joint resolution, approved May

2 21, 1866, the Western Pacific Railroad Company of California, a corporation created and existing under the laws of California, built the railroad and telegraph line referred to in said acts, from San José to Sacramento, in all respects in conformity to said acts; that the right to construct said portion of the railroad and telegraph line was assigned by the Central Pacific Railroad Company of California, in the said acts mentioned, to the said Western Pacific Railroad Company; that commissioners were duly appointed under said acts, and reported to the President that the road was built in conformity to law, and within the time prescribed by law, and that the Western Pacific Railroad Company performed all the conditions on its part to be performed, and that in consequence thereof the President of the United States issued a patent to said Western Pacific Railroad Company on the ninth day of April, 1870, conveying the southwest quarter of section thirty-one, in township three south of range seven east, Mount Diablo base and meridian; that said land was in all respects the character of land contemplated by said acts of Congress.

Complainant further shows, that by virtue of divers and sundry

3 mesne conveyances the title acquired by said company is vested in complainant.

The complainant further shows, that subsequent to the issuance of the patent to the said Western Pacific Railroad Company the President of the United States issued a patent to said land to Ransom Dayton, and that by divers and sundry conveyances the title has passed to the defendant, and he now claims said land. That in said second patent it was recited that a patent had issued by mistake to the Western Pacific Railroad Company, and that it was because said land was within the exterior limits of a Mexican grant called Moquelamos, which said grant was rejected by the Supreme Court of the United States in the December term, 1864, and before the reservation for the railroads in said acts of Congress mentioned; that the President of the United States pretended that the rejection took place on the thirteenth day of February, A. D. 1865, which said day was after the reservation for railroad purposes; that the President of the United States and officers of the government pretended that the fact of said lands being claimed under a Mexican grant made

them reserved under the acts of Congress, whether said claim
4 was just or unjust, legal or illegal, and that the officers of the government could look into the minutes of the Supreme Court of the United States and see the day the said claim was rejected, and not take the mandate of the Supreme Court as the record; that on this account alone the President issued the said second patent, and refuses to recognize the rights of complainant.

And the complainant further shows that he is the owner of the fee simple of said piece of land above described; that the defendant is in posssession of said land and sets up some title thereto, and that the claim of defendant is a cloud upon complainant's title, and greatly injures the value thereof.

To the end, therefore, that the said G. D. Newhall may, if he can, show cause why his title should not be canceled or vacated, and the title of the plaintiff decreed to be good and genuine, and why your orator should not have the relief to which he is entitled, and that your orator may have such other and further relief in the premises as the nature of the case and equity requires and as to this court may seem just
5 and proper; may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this court, directed to the said G. D. Newhall, defendant, and commanding him on a day certain and therein to be named to be and appear in this court, then and there to answer all and singular the premises, and to stand to and perform and abide such further order, direction, and decree as may be made against him.

And your orator, as in duty bound, will ever pray.

TULLY R. WISE,
Solicitor for Complainant.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } *ss.*

Charles W. Sanger, being duly sworn according to law, deposes and says, that he is the plaintiff in the above entitled cause, and that he has heard read the foregoing bill, and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

CHAS. W. SANGER.

6 Subscribed and sworn to before me this 14th day of November, A. D. 1874.

JOS. F. O'BEIRNE, *U. S. Comm'r.*

(Endorsed:) Filed Nov'r 14th, 1874. L. S. B. Sawyer, clerk, by Jos. F. O'Beirne, deputy clerk.

7 *Appearance of Solicitor for defendant.*

Circuit Court of the United States, 9th Circuit, District of California.

CHARLES W. SANGER, PLAINTIFF,
vs.
G. D. NEWHALL, DEFENDANT. } In equity.

The clerk will enter my appearance as solicitor for the said defendant in the action above entitled.

Dated, Dec'r 28, 1874. WM. IRVINE, *Sol'r for Def't.*

To L. S. B. SAWYER, ESQ., *Clerk, &c.*

(Endorsed:) Filed 29 December, 1874. L. S. B. Sawyer, clerk.

8 *Demurrer.*

In the Circuit Court of the United States for the 9th Circuit, in and for the District of California.

CHARLES W. SANGER, PLAINTIFF,
vs.
G. D. NEWHALL, DEFENDANT. } In equity.

The demurrer of G. D. Newhall, defendant, to the bill of complaint of Charles W. Sanger, the above-named plaintiff.

This defendant not confessing all or any of the matters and things in the plaintiff's said bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to the said bill, and for cause and grounds of demurrer sheweth and allegeth:

That the said bill of complaint doth not contain any facts sufficient or matter of equity whereon this court can ground any decree, or grant any relief to the plaintiff against this defendant.

9 Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and demands the judgment of the court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WM. IRVINE, *Sol'r for Defendant.*

J. P. PHELAN, *of Counsel.*

I certify that, in my opinion, the foregoing demurrer of G. D. Newhall, defendant, to the bill of complaint of Charles W. Sanger, complainant, is well founded in law and proper to be filed in the above cause.

WM. IRVINE, *Sol'r for defendant.*
J. P. PHELAN, *Of Counsel for def't.*

UNITED STATES OF AMERICA,
DISTRICT OF CALIFORNIA. } *ss.*

G. D. Newhall, being duly sworn, does depose and say that
10 he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

G. D. NEWHALL.

Sworn to before me January 6th, 1875.

JOS. F. O'BEIRNE, *U. S. Comm'r Cal.*

(Endorsed:) Filed Jan'y 13th, 1875. L. S. B. Sawyer, clerk, by Jos. F. O'Beirne, deputy clerk.

11 *Equity Enrollment.*

At a stated term of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California, held at the court room of said circuit court, in the city and county of San Francisco, on Friday, the 26th day of February, A. D. 1875.

Present, Honorable Lorenzo Sawyer, Circuit Judge.

CHARLES W. SANGER
vs.
G. D. NEWHALL.

The complainant filed his bill in equity against said G. D. Newhall, defendant, on the 14th day of November, A. D. 1874, and thereupon a subpœna was issued requiring the said defendant to appear and plead herein on the 1st Monday of January, A. D. 1875.

The defendant appeared herein by his solicitor, William Irvine, esq.

On the 13th day of January, A. D. 1875, the defendant filed a
12 demurrer to said bill of complaint, which is hereto annexed.

On the 26th of February, A. D. 1875, the said cause having been previously brought to a hearing on said demurrer, a final decree was made and entered therein in the words and figures following, to wit:

13 *Decree.*

In the Circuit Court of the United States for the District of California, Ninth Circuit.

CHARLES W. SANGER, COMPLAINANT,
vs.
G. D. NEWHALL, DEFENDANT.

This cause came on regularly to be heard on the demurrer to the bill, and was submitted by counsel without argument, and thereupon, upon consideration, the demurrer was overruled, and the defendant declining to answer the bill, it was ordered that a decree for complainant be entered in pursuance of the prayer of the bill.

It is, therefore, ordered, adjudged, and decreed as follows, to wit: That the complainant, Charles W. Sanger, is the owner in fee simple of the southwest quarter section thirty-one, in township three, south of range seven east, Mount Diablo base and meridian, and that the defendant has no title thereto.

14 And it is further ordered, adjudged, and decreed that the patent under which the defendant claims, so far as it relates to the said tract or parcel of land, be, and the same is hereby, canceled, and the title of the complainant to the same is decreed to be perfect.

It is further ordered, adjudged, and decreed that complainant may have a writ of assistance to recover possession of the said southwest quarter of section thirty-one in township three, south of range seven east, Mount Diablo base and meredian.

(Signed) LORENZO SAWYER,
February 26, 1875. *Circuit Judge.*

(Endorsed:) Filed and entered the 26th day of February, A. D. 1875. L. S. B. Sawyer, Clerk.

15 Whereupon the said pleadings, the appearance of said defendant, and said final deree are duly annexed hereto, and this decree is duly signed, filed, and enrolled, pursuant to the practice of this court.

Attest, &c. L. S. B. SAWYER, *Clerk*,
[SEAL.] By J. F. O'BEIRNE, *Deputy Clerk*.

(Endorsed:) Enrolled papers. Filed 26th February, 1875. L. S. B. Saywer, clerk, by J. F. O'Beirne, deputy clerk.

16 *Bond.*

In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the District of California.

CHARLES SANGER, APPELLEE AND COMPLAINANT,
vs.
G. D. NEWHALL, APPELLANT AND DEFENDANT.

Know all men by these presents that we, William B. Carr and David Mahoney, residents and freeholders of the State of California, and within the district thereof, are held and firmly bound unto said Charles W. Sanger in the sum of three thousand dollars, to be paid to said Charles W. Sanger, his heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-sixth day of February, in the year of our Lord one thousand eight hundred and seventy-
17 five, at the city and county of San Francisco, in said district of California.

WILLIAM B. CARR. [L. S.]
DAVID MAHONEY. [L. S.]

Whereas the above-named G. D. Newhall has duly appealed to the Supreme Court of the United States of America to reverse the decree made and entered in the above-entitled cause on the twenty-sixth day of February, A. D. 1875:

Now, therefore, the condition of this obligation is such, that if the above-named G. D. Newhall shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signed, sealed, and delivered in presence of—

JAS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss.

William B. Carr and David Mahoney, being severally duly
18 sworn, each for himself, deposes and says, that he is the person named in and who subscribed the foregoing bond as one of the sureties therein; that he is worth double the amount named therein as the penalty thereof, over and above all his just debts and liabilities, and property exempt from execution; and that he is a resident and freeholder within said district.

WILLIAM B. CARR.
DAVID MAHONEY.

Subscribed and sworn to before me, February 16th, 1875.
JOS. F. O'BEIRNE, *U. S. Comm'r, Cal.*

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Febry. 26, 1875. (Sg'd) Lorenzo Sawyer, U. S. Circuit Judge. Filed March 1, 1875. L. S. B. Sawyer, Cl'k, by J. F. O'Beirne, Dep. Cl'k.

19

Order Granting Appeal.

At a stated term of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the District of California, held at the court room, in the city of San Francisco, on Monday, the first day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Present, the Honorable Lorenzo Sawyer, Judge.

CHARLES W. SANGER, COMPLAINANT,
vs.
G. D. NEWHALL, DEFENDANT,

At this day, on motion of William Irvine, esq., solicitor for said defendant, it is ordered that an appeal from the decision and decree in the above-entitled cause, filed and entered on the twenty-sixth day of February, A. D. 1875, of the February Term, A. D. 1875, to the Supreme

20 Court of the United States be, and the same is hereby, allowed, and that a certified transcript of the pleadings be forthwith transmitted to said Supreme Court.

21 UNITED STATES OF AMERICA, DISTRICT OF CALIFORNIA. } *ss.*

I, Lorenzo S. B. Sawyer, clerk of the Circuit Court of the United States for the District of California, in the Ninth Judicial Circuit, do hereby certify that the foregoing twenty pages, numbered from 1 to 20, both inclusive, constitute the transcript on appeal in the suit entitled "Charles W. Sanger vs. G. D. Newhall," from said circuit court to the Supreme Court of the United States of America.

Witness my hand and the seal of said circuit court this 1st [SEAL.] day of March, A. D. 1875.

L. S. B. SAWYER, *Clerk*,
by J. F. O'BEIRNE, *Dep. Cl'k.*

is duly signed,
Attest, &c.
[SEAL.]

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Febry. 26, 1875. (Sg'd) Lorenzo Sawyer, U. S. Circuit Judge. Filed March 1, 1875. L. S. B. Sawyer, Cl'k, by J. F. O'Beirne, Dep. Cl'k.

19 *Order Granting Appeal.*

At a stated term of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the District of California, held at the court room, in the city of San Francisco, on Monday, the first day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Present, the Honorable Lorenzo Sawyer, Judge.

CHARLES W. SANGER, COMPLAINANT,
vs.
G. D. NEWHALL, DEFENDANT,

At this day, on motion of William Irvine, esq., solicitor for said defendant, it is ordered that an appeal from the decision and decree in the above-entitled cause, filed and entered on the twenty-sixth day of February, A. D. 1875, of the February Term, A. D. 1875, to the Supreme Court of the United States be, and the same is hereby, allowed,
20 and that a certified transcript of the pleadings be forthwith transmitted to said Supreme Court.

21 UNITED STATES OF AMERICA,
DISTRICT OF CALIFORNIA. } *ss.*

I, Lorenzo S. B. Sawyer, clerk of the Circuit Court of the United States for the District of California, in the Ninth Judicial Circuit, do hereby certify that the foregoing twenty pages, numbered from 1 to 20, both inclusive, constitute the transcript on appeal in the suit entitled "Charles W. Sanger vs. G. D. Newhall," from said circuit court to the Supreme Court of the United States of America.

Witness my hand and the seal of said circuit court this 1st day of March, A. D. 1875.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
by J. F. O'BEIRNE, *Dep. Cl'k.*

Supreme Court of the United States.

NEWHALL
vs.
SANGER.
No. 503.

BRIEF FOR APPELLEE.

CASE.

This is a bill in equity filed by Sanger in the court below to establish his patent to a tract of land in California, and to set aside a junior and conflicting one. The bill makes title to Sanger from the United States through the Central Pacific and Western Pacific Railroad Companies and their grantees.

The claim of Newhall is set up under a later patent issued to him under color of the land laws.

The bill was demurred to, and a final decree was rendered in the Circuit Court in favor of Sanger.

The single question raised by the bill, and the only one in controversy, is, did the Western Pacific Railroad Company become lawfully entitled to the land in question upon its compliance with the requirements of the Pacific railroad acts of 1862 and 1864, and under the act of March 3, 1865, amendatory thereof, and which made said company the lawful assignee and successor of the other companies in all respects, within the region embracing the land in dispute.

The bill states that the provisions of these acts were duly

complied with. That the land in dispute was a part of the public lands covered by the grants, and that a patent was issued accordingly in April, 1870. (Folio 2.)

It further states, in effect, that the land was withdrawn for the benefit of the company after the first Monday of December, 1864, when the definite location of the line was fixed, &c., and before the 13th day of February, 1865; that the second patent was issued on the ground that at the date of the passage of the railroad acts, and at the time of definite location and withdrawal, this land was within the exterior boundary of a Mexican grant called the Moquelamos, which turned out to be a fictitious claim, as was decided by the Supreme Court at said December Term, and announced on the 13th of February, 1865, which *announcement* was subsequent to the definite location and withdrawal, while the day on which, by law, the court is held was prior to such location and withdrawal.

The case was submitted, and decided without argument in the Circuit Court, because, in a prior case arising on the same Mexican grant, the court had, upon full argument, decided the broad question in favor of the title of the railroad company. (See the case of Sawyer *v.* Sargeant, Circuit Court, District of California, September 10, 1874, Pacific Law Reports.)

ARGUMENT.

I.

The acts containing those grants not being mere acts of favor or generosity, or arising out of the general beneficence of the Government, but being founded upon special considerations of eminent public policy and of urgent necessity, as well as of specific gain and advantage to accrue to the Government from the building of the lines, are not to be paralyzed by the assaults of prejudice, or frittered away by fine spun and ingenious dialectics. They should have a fair construction. They should neither be stretched nor cramped to favor either party. Implications and intendments ought to be applied equally in respect of rights granted and duties imposed, or not made at all.

We demand nothing that the acts do not fairly confer, and we may justly resist limitations and reservations that do not, on the same principles of interpretation, fairly appear in the statute.

II.

Under the foregoing, or, indeed, any other known rule by construction, it is plain, we think, that the company was entitled to the land. That it had paid the price and performed the condition on its side, is admitted.

Did the existence of the false claim under a fabricated Mexican grant have the effect to put the land within the category in the act of 1862 of lands "sold, reserved, or otherwise disposed of by the United States," or "to which a pre-emption or homestead claim may * * have attached;" or as "mineral lands," or within the description of lands

there was a "lawful claim" as named in the amendatory act of 1864?

It was not "mineral land," unless a false Mexican grant may be in law, as it has sometimes been, it is said, in fact, "a mine of wealth." It had not been "sold or otherwise disposed of by the United States," nor had it fallen under pre-emption or homestead.

To withdraw it from the grant, then, it must be shown that it had been "*reserved.*" By the distinct reading of the third section of the act of 1862, it must have been "reserved *by the United States.*" These words are not limited to "otherwise disposed of;" they apply both by grammar and common sense to "sold" and "reserved." There can be no presumption of a reservation on the face of this act, or of a sale or other disposition. The grantees cannot be required to prove, in the first instance, that the lands within the described territory had *not* been sold or reserved," &c. This would be contrary to the philosophy of evidence. By the principles of universal law the title of all lands is presumed to rest originally with the sovereign power, and to remain so until its transmission shall be shown.

What, then, is it to be "reserved," and what is a reservation?

The root of the word, *reservo,* means, according to the lexicographers, to keep back, to save up.

And in our language reserved is defined as "kept for another use, retained," and reservation is said to mean "something *withheld*, either not expressed or disclosed, or not given up or brought forward." The essential idea is that a thing reserved is not merely a thing not declared or conveyed, &c., but it is essentially a thing distinctly and consciously retained and set apart by the actor, by an affirmative mental act, (it it be a thing intangible,) or by an affirmative declaration, or visible act if it be a thing tangible. Leaving things *simply* as they were before is not a reservation. If a man sells half his farm and says nothing about the other half, that does not make the residue a reservation.

The list of instances of the use of words in question herewith submitted may be of interest, as showing the universality and constancy of their *active* quality. In military operations the "reserves" of an army are not the mass of soldiers unemployed, but a definite and organized body of troops set apart for the special exigencies of the conflict.

See, also, the reservation of rents in leases; and, as in the modern civil law, the examination of a witness, &c., "under reserve." The sentence itself in which the word occurs furnishes the true meaning of it. The language is, "sold, reserved, or *otherwise disposed of* by the United States." Therefore, lands described as "reserved," are those of which a reservatory *disposition* had been made.

Indeed, in this very case, if the term "reserved" includes lands not specifically set apart by some affirmative and lawful act, then no lands at all were granted, for in that case it would of necessity cover all the lands.

The action of the Government from the beginning, and the uniform decisions of the judiciary, show, we think, conclusively, that "reserved lands are those only which, being public lands of the United States, have been by general or special description specifically *withdrawn* from the body of public lands and set apart for some special use by act of legislation, or by some lawful order of the executive department." The acts of Congress, hereinafter referred to, as well as many others, and the following cases, prove this, we think, conclusively:

Wilcox *v.* Jackson, 13 Pet., 498.
Vincennes University *v.* Indiana, 14 How., 271.
Grisar *v.* McDowell, 6 Wall., 363.
Wolcott *v.* De Moines Co., 5 Wall., 681.

In this last case the lands were expressly and repeatedly reserved by the executive department to meet a particular contingency. In the case at bar no such thing occurred.

III.

In order to meet the necessity that these principles create, the appellant will attempt to show that Congress has by law reserved and set apart, from all disposition, not only all lands covered by valid foreign grants, but all covered by any species of false claims advanced under pretense of a foreign grant. This proposition is based, it is understood—1st, upon the 13th section of the act of March 3, 1851, (9 Stat., 631,) for the settlement of private land claims in California. The only clause which has been relied on is this: "That all lands, the claims to which have been finally rejected by the Commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or Supreme Court, and all lands the claims to which shall not have been presented to the said Commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States."

The first observation to be made upon these words is, that if they constitute any reservation at all, they necessarily do so of *all the land in California* for two years, at least; for they not only cover lands for which claims *are* presented, but *all lands* for which no claims shall be presented within two years, which are, mathematically, all the lands in the territory! The most explicit language ought to be used to uphold such an absurdity.

The second observation is, that our opponents have mistaken the purpose, meaning, and consequence of these words in supposing them to raise a reservation of any lands at all. No such words were ever used before or since for such effect.

They do not imply that meantime no such lands shall be disposed of or settled upon. The strongest argument is that, if not reserved, lands covered by claims determined to be valid might have been sold or granted, &c., so as to produce a conflict of title. That is true; but in such case the

Mexican title would prevail, and the grantee of the land would have to be indemnified.

Certainly the judiciary can allow the legislative department to leave things in that condition. Do we not know historically that such was a wise and necessary policy in the then state of the gold excitement, and in the political expediency of at once filling up that fairest land of the Pacific with intelligent and energetic citizens from the Eastern States?

The third observation is, that on floats no reservation or provision for the grantee would be needed in any case, as his location could be made when his title should be confirmed out of any public lands.

Fourth. All prior laws on such subjects have, when the legislative power intended that the lands claimed should be held to await the final disposition of the title, made special provision that they should not be disposed of until a certain period stated. (See several instances of this character in the statutes cited appended to this brief.)

Fifth. This act, as its title indicates, and as every word in it shows, was not an act for disposing of or reserving public lands, but purely for the judicial determination of disputed titles, quieting the same and putting an end to litigation upon that class of subjects. To infer from this alone that Congress intended to tie up all the lands covered by the innumerable floating fictitious claims known to exist in California at that time, would, as we think, be an insult to common sense.

Sixth. The plain, evident, and only meaning of the words sought to be pressed into the service of the appellant is to create a statutory bar against further claims and further litigation. A tribunal is created; all parties are required to present all their claims within a certain period, and to prosecute them to effect, and failing to do this, the statute declares, as the fit and expedient consequence, that all lands to which claims shall not have been so presented, and all those to which the claims shall not be thus judicially maintained, shall be deemed, held, and considered as

part of the public domain of the United States. That is to say, no further question of private rights or claims in respect of such lands shall be admissible. It is a conclusive legislative declaration of the consequence of the failure to submit to judicial decision within the time limited, or of a failure to maintain in the judicial tribunal the pretentions set up. It thus merely becomes determined in a conclusive way that the lands were never affected by any private title or claim, but had always been a part of the public domain of the United States, precisely of that character to which the grant to these railroads ought to apply. The law does not say the land shall *become* part of the public domain, but definitively ascertains the pre-existing fact. A *reservation* is always carved out of a part of the public domain.

IV.

But the appellant, as if two insufficient reasons were better than one, appeals to the act of March 3, 1853, (10 Stats., 244, chap. 143,) as in some way tending to show that the existence of this false foreign claim amounted to a reservation. It is claimed that the words, "heretofore reserved on account of claims under French, Spanish, or other grants," show that the lands embraced in the Moquelamos claim were also embraced. The soundness of this logic is not perceived. The act undoubtedly implies that some lands had been theretofore reserved by some definite act of Government authority, either by legislation or executive order.

But in order to raise the implication that this land had been reserved it would be necessary to show that it was embraced in the prior legislation or order. No such attempt is made. The act itself creates no reservation, but in express terms refers to lands "heretofore reserved." It will be seen, on reference to the statutes cited at the foot of this

brief, that there were many instances of such reservations to which this act could apply, but no such instance in California. Congress having declared that certain lands under certain circumstances in Louisiana, Missouri, and other States, should be reserved pending the determination of private claims, and not having declared that any lands in California should be so reserved, nothing short of judicial legislation can carry the California lands into the legislation provided for the other States. The just inference is exactly the reverse of that claimed by the appellant, viz, that Congress did not intend to embarrass the settlement of California by the reservation of all lands covered by disputed claims. This act also shows clearly that the existence of an undetermined claim under a foreign grant did not work a reservation, but that some affirmative provision of law was necessary to reserve such lands.

Again: This act opens to pre-emption lands situated precisely as the land in controversy was, and to pre-emption only of the alternate sections, showing clearly, if we are to go into the region of speculation or implication, that Congress regarded the railroad land grants as applying precisely to such lands if the title of the claimant should turn out to be false, and, therefore, restricted the rights of pre-emption to those sections which would belong to the United States.

But this is not all. By an act of the same date Congress, conscious that the act above referred to had no application to any lands in California, passed the act (10 Stat. 244, chap. 145) "to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes."

This latter act was a complete code, covering the whole subject of the disposal of the public lands in that State. It fixed definitely the relative status and classification of the various heads of public lands which are not to be pre-

empted or disposed of at the will of the settler. Lands appropriated under the authority of that act are one class, lands reserved by competent authority are another class, and the lands claimed under any foreign act or title another, and the mineral lands still another.

It is thus as manifest as words can make it that the laws relating to California lands treat lands claimed under foreign grants as different and distinct from lands reserved. The words "reserved by competent authority" are precisely the same in effect as those mentioned in the act granting these lands in 1862, viz, "reserved by the United States," and those used in the act of 1864, "Government reservation." When the acts of 1862 and 1864 were passed, therefore, this act of 1853 was in force, and presumably in the mind of the legislature. It, acting upon its own discretion, did not choose to exclude from its grant to railways, lands which might be claimed under foreign grants and which should turn out to really belong to the United States. It would evidently not be just, and if it should turn out that particular lands did belong to private claimants, then the grant would not affect them at all, because they were not at the time public lands of the United States, but were the property of private owners. Congress, therefore, in limiting the extent of its grant, and to reserve to itself such part of the land as its convenience or its duty should require, fixed this descriptive limitation by definite and exact words which did not include claims under foreign grants. This is just as clear (if we concede to Congress the free exercise of its discretion) as the other classes of cases cited below, in which, when a reservation of such lands were thought desirable, definite provision has been made for it.

This is rendered, if possible, still more plain by the amendatory act of July 2, 1864, in which the limitations upon the grant, or rather the exclusions from it, are stated in this way, "and any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or any other *lawful* claim, nor include any Government reservation, or min-

eral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands." It will be perceived that in this substituted description of exclusions from the grant, the exclusion is of lands against which there should be any *lawful* claim.

Now, the appellant, in order to maintain his pretentions, must convince the court that there shall be added to this specific language a declaration that the grant shall not cover or affect any lands in respect of which there may exist an unlawful or a fictitious claim. Can the court read this legislation in that way?

All the alternate sections of the public lands within the definite limits were granted to the company with certain exceptions. The lands in question were confessedly public lands. No person at that time or at the time of the definite location of the land had any right to them whatever. Then, in order to ascertain if these lands were excepted or excluded from the grant, we must ask if they fall within the description of the excepted or excluded lands. It is clear that they do not, unless we confound all distinctions and assert that "lawful claim" may be read "unlawful claim," or that a Government reservation arises by force of law and without any legislation whatever, whenever and wherever a false claim to any public land is set up.

V.

Again, we submit that the two acts of 1853, before referred to, did not, in respect to the subjects upon which they operate, prevent any disposition by pre-emption, grant, or otherwise, of public lands claimed under any fictitious foreign grant or other false title. The first act of 1853 specifically does not, and this special authority to pre-empt public lands subject to the contingency of a foreign claim being rejected, was rendered necessary by the circumstance that the class of lands referred to in the act had been, as we have shown,

and as appears from the acts below cited, expressly reserved from pre-emption or other disposition. So that special words would, upon ordinary principles of construction, be necessary to remove the bar.

But, as we have shown, in California there was no such prohibition ever existing or anything looking to it. The private land claims act of 1851, like ordinary acts for judicial investigation and determination, left all persons to stand upon their rights and to act with reference to lands they might claim or wish to settle upon at their peril. And so, when the act of 1853 providing the land system for California was passed, general pre-emption was allowed with the usual exceptions, and "excepting also the lands claimed under any foreign grant or title." Now, we insist that these words mean lands *lawfully* claimed under any foreign grant or title. It is, we suggest, of the same nature as the word "held" in the connection in which it is used, except that it would cover lands of which the owner had been ousted; so that in a technical sense he could not be said to hold them. The whole equity and just policy of the statute, so far as we can perceive, would thus be answered, and the pre-emptor be put upon the same ground as the pre-emptors in the other States.

But, whether this is so or not, it is difficult to see how a limitation upon pre-emption alone, created in 1853, and having no reference to anything else, can be used to show by its own intrinsic force that Congress in 1862 and 1864, in using language that had no such limitation and applied to no such subject, must have intended to import this also, or to give to their legislation of ten years afterwards upon another subject the same effect.

VI.

We submit, that it is clear from the acts of 1862 and 1864, as well as from the decisions of this court, that the

rights of the railway company became fixed to definite lands at the date of their location, and not at the date of the act, and that in the intermediate time it would be competent for Congress to continue to sell and dispose of its public lands in the territories through which the railways might pass. Any other construction would produce immeasurable inconvenience, and, indeed, the language of the act of 1862 seems to be specially definite upon that subject. The grant is of the alternate sections of the public lands within a certain distance of the line as definitely located, and with certain exceptions existing "at the time that the line had been definitely fixed." Everything, then, in respect of the designation and identity of the thing granted, with its attendant exceptions, must be referred to that period. Whatever was then public land unappropriated to other purposes, and to which, as stated in the act of 1864, no lawful claim had then attached, was granted, and the absolute right of the company to it became fixed by its definite location, &c. And this definite location, as is gathered from the record, although the precise date is not named, was between the first day of the December (1864) term of this court and the 13th day of February, 1865. (See statement in record, folio 3.) The Moquelamos grant was finally determined to have been false and fictitious at that term—the decision of the court being promulgated on the 13th day of February, 1865.

Now, if it were possible to suppose this false claim, existing at the date of the grant, brought the land covered by it within any exceptions, still, if that false claim had become exploded before the definite location of the line, the land would have become public land, pure and simple, and so the right of the railway would attach to it on its location.

We submit, that in contemplation of law this false claim was exploded on the first Monday of December, 1864, to which date the decision of the court, pronounced 13th February, 1865, must be referred.

This is true, as is well known, in respect of the death of parties litigant, and we see no reason why it must not also be true in respect of the death of a fabricated land grant.

We append hereto quotations from and references to several of the various statutes supposed to bear upon the subject. They are believed to embrace all of the laws bearing directly upon the question, and many others explaining and illustrating the meaning of the acts more directly in question.

We also append for the convenience of the court a number of references in support of the meaning that attaches to the words "reserved" or "reservation."

All of which is respectfully submitted by

GEORGE F. EDMUNDS,
Of Counsel.

Act of July 1, 1862, entitled (12 Stats., 492,) "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes." Section 3 provides:

"That there be and is hereby granted to said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company."

Section 7 of the same act (p. 493) provides:

"That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said jail road and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: *Provided*, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named."

In section 4 of the act of July 2, 1864, (13 Stats., 358,) entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," it is provided:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation, or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "An act donating lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, and notice thereof given at the proper land office."

Section 2 of the act of March 3, 1865, (13 Stats., 504,) entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and

other purposes,' approved July first, eighteen hundred and sixty-two, and to amend an act amendatory thereof, approved July second, eighteen hundred and sixty-four," provides:

"That the assignment made by the Central Pacific Railroad Company of California to the Western Pacific Railroad Company of said State of the right to construct all that portion of said railroad and telegraph from the city of San Jose to the city of Sacramento is hereby ratified and confirmed to the said Western Pacific Railroad Company, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof: *Provided*, That the time within which the said Western Pacific Railroad Company shall be required to construct the first twenty miles of their said road shall be one year from the first day of July, eighteen hundred and sixty-five, and that the entire road shall be completed from San Jose to Sacramento, connecting at the latter point with the said Central Pacific railroad, within four years thereafter."

Section 13 of the act of March 3, 1851, (9 Stats., 631,) entitled "An act to ascertain and settle the private land claims in the State of California," provides:

"That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

The act of March 3, 1851, (9 Stats., 617,) is an appropriation bill, and provides:

"For surveying the public lands and private land claims

in California, in conformity with the provisions of the act of Congress authorizing similar surveys, twenty-five thousand dollars."

The act of August 31, 1852, (10 Stats., 90,) entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirtieth of June, eighteen hundred and fifty-five, and for other purposes," provides:

"For subdividing lands in California into townships, equal to two thousand seven hundred miles of surveying, at a rate not exceeding fourteen dollars per mile, thirty-seven thousand eight hundred dollars.

"For subdividing one hundred and fifty townships in California into sections, at a rate not exceeding twelve dollars per mile, one hundred and eight thousand dollars.

"For extending surveys in California through the mineral region, twenty thousand dollars.

"For surveying private claims in California which may have been presented in good faith to the Board of Land Commissioners, twenty-two thousand five hundred dollars: *Provided*, That the authority hereby conferred on the surveyor general shall apply only to such unconfirmed cases as in the gradual extension of the lines of the public surveys he shall find within the immediate sphere of his operations, and which, he is satisfied, ought to be respected, and actually surveyed in advance of confirmation."

The act of March 3, 1853, (10 Stats., 244, ch. 143,) entitled "An act to extend pre-emption rights to certain lands therein mentioned," provides:

"That the pre-emption laws of the United States, as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of Congress: * * * *And provided further*, That any settler who has settled, or may hereafter settle, on lands heretofore reserved on account of claims under French, Spanish, or other grants which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, en-

titled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

The act of March 3, 1853, (10 Stats., 244, ch. 145,) entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," provides in section 1 for the appointment of surveyor general for California.

Section 2 makes allowance for clerk hire, &c.

Section 3 confers upon him the same power and authority, and imposes the same duties respecting the public lands and private claims in the State of California as by law appertain to and are required of the surveyor general in Louisiana, except so far as the same may be modified by this act, and requires him to survey and establish the lines of the public lands and to survey all private claims after they shall have been confirmed.

Sections 4 and 5 provide the practical machinery for a complete land system for California.

The sixth section subjects the public lands in the State to pre-emption, except the 16th and 36th sections, "and with the exception of lands appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands."

The act of July 22, 1874, (10 Stats., 308,) provides for establishing a land system for New Mexico, and the 8th section requires the surveyor general to investigate and report upon all claims to lands under the laws, usages, and customs of Spain and Mexico, and to decide upon their validity, also in respect to all pueblos, and requires such report to be laid before Congress for action. It then declares: "And until the final action of Congress on such claim, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to donations granted by the previous provisions of this act."

The act of March 26, 1804, (12 Stats., 277,) makes provision for disposing of the public lands in the Indian territory, and for adjusting private land claims under British, French, or United States grants; and in section 4 it provides that—

"The lands, the claims to which shall have been thus affirmed by the commissioners, shall not be otherwise disposed of until the decision of Congress thereupon shall have been made."

The act of April 21, 1806, (2 Stats., 395,) provides for laying out tracts of land in the Indiana territory and in the State of Ohio to satisfy French or British grants, and then provides that—

"The tracts thus laid out shall not be otherwise disposed of unless by order of Congress."

The act of July 9, 1832, (4 Stats., 565,) provides for the adjustment of claims under French and Spanish grants in the State of Missouri, and requires a classification of the good and bad claims by the commissioners, and a report to Congress. The 3d section provides that, upon the report of the commissioners, the lands covered by rejected claims shall be subject to sale the same as other public lands, and that the lands covered by claims reported upon favorably shall continue to be reserved from sale as heretofore until the decision of Congress shall be made thereon.

This probably refers to the positive prohibition contained in the act of March 26, 1804, (2 Stats., 289,) against any person surveying or settling any lands belonging to the United States within the limits of Louisiana; and to the act of March 3, 1811, (2 Stats., 662,) making provision for the adjustment of land claims and for the sale of public lands in the territories of Orleans and Louisiana, in which it is provided (sec. 6) that—

"Till after the final decision of Congress thereon no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the register of the land office and filed in his office, for the purpose of being

investigated by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in the territory of Orleans."

The act of April 21, 1806, (12 Stats., 391,) makes further provision for adjusting land claims in the territory of Orleans, and provides that "the lands which may be embraced by such report shall not be otherwise disposed of until the decision of Congress shall have been had thereupon." But this statute, and the one to which it is supplementary, (already referred to,) covered claims under French and Spanish grants in the whole Louisiana purchase.

Similar reservations were made by Congress from time to time in respect of British, Spanish, and territorial grants, which will be seen by reference to the act of March 3, 1803, (2 Stats., 229,) which provides, in section 7, that the "lands contained in such grants shall not be otherwise disposed of until the end of the year after that time."

Some instances where the word *reserved* occurs in Milton:

Speaking of Lucifer, and what had befallen him:

* * * But his doom
Reserved him to more wrath; * *
P. L., b. 1, l. 54, p. 209.

Belial's speech, quoting those who counsel war:

Wherefore cease we then?
we are decreed,
Reserved, and destined to eternal woe;
Whatever doing, what can we suffer more,
What can we suffer worse?
P. L., b. 2, l. 161, p. 258.

Beelzebub's speech:

Must we renounce all titles, and, changing style, be called
Princes of Hell? for so the popular vote inclines,
Here to continue, and build up an empire! while we dream,
And know not that the King of Heaven hath doomed
This place our dungeon, not our safe retreat.
Beyond his potent arm, to live exempt
From Heaven's high jurisdiction, in new league
Banded against his throne, but to remain
In strictest bondage, though thus far removed,
Under the inevitable curb, reserved
His captive multitude: for he, be sure,
In heighth or depth, still first and last will reign
Sole king. P. L., b. 2, l. 322, p. 264.

Close of Adam's remarks, comforting Eve after her dream:

Be not disheartened then, nor cloud those looks
That wont to be more cheerful and serene
Than when fair morning smiles on the world;
And let us to our fresh employment rise
Among the groves, the fountains, and the flowers,
That open now their choicest bosomed smells,
Reserved from night, and kept for thee in store.
P. L., b. 5, l. 128, p. 385.

After finishing his remarks to the angel, who had unfolded the mysteries of creation, &c., to him, Adam appears studious and thoughtful, which Eve noticing—

Rose, and went forth among her fruits and flowers,
To visit how they prospered, bud and bloom,
Her nursery: they at her coming sprung,
And, touched by her fair tendance, gladlier grew.
Yet went she not, as not with such discourse
Delighted, or not capable her ear
Of what was high: such pleasure she reserved,
Adam relating, she sole auditress.
P. L., b. 8, l. 50, p. 35.

Beginning of Adam's lament upon seeing the vision of misery shown him by the angel Michael, after the eating of the fruit:

> O, miserable mankind, to what fall
> Degraded, to what wretched state reserved.
>
> P. L., b. 11, l. 501, p. 173.

Samson, bemoaning his condition, says, speaking of Heaven:

> I was his nursling once, and choice delight,
> His destined from the womb,
> Promised by heavenly message twice descending;
> But now hath cast me off as never known,
> And to those cruel enemies,
> Whom I by his appointment had provoked,
> Left me all helpless, with the irreparable loss
> Of sight, reserved alive to be repeated,
> The subject of their cruelty or their scorn.
>
> Samson Agonistes, p. 333, l. 645.

Some instances where the words *reservation* and *reserved* occur in Shakespeare.

Hel.

> You know my father left me some prescriptions
> Of rare and proved effects, such as his reading
> And manifest experience had collected
> For general sovereignty; and that he will'd me
> In heedfull'st reservation to bestow them,
> As notes whose faculties inclusive were,
> More than they were in note.
>
> All's Well, Act 1, sc. 3, p. 242, 2d column.

Parolles.

I most unfeignedly beseech your lordship to make some reservation of your wrongs; he is my good lord; whom I serve above is my master.

All's Well, Act II., sc. 3, p. 247, 1st column.

Lear, (to Kent and the dukes.)

* * * * * * *

> I do invest you jointly with my power,
> Pre-eminence, and all the large effects
> That troop with majesty. Ourself, by monthly course,
> With reservation of a hundred knights,
> By you to be sustained, shall our abode
> Make with you by due turns.
>
> King Lear, Act 1, sc. 1, p. 800, 2d column.

Lear, (to his daughters.)

> Made you my guardians, my depositaries;
> But kept a reservation to be follow'd
> With such a number.
>
> King Lear, Act II, sc. 2, p. 812, 2d column.

Provost, (to the Duke.)

Pardon me, noble lord:
I thought it was a fault, but knew it not;
Yet did repent me after more advice
For testimony whereof, one in the prison,
That should by private order else have died,
I have reserv'd alive.

Meas. for Meas., Act V, sc. 1, p. 86, 1st column.

Lenox, (to Macbeth—place at table.)

Here is a place reserv'd, sir.

Macbeth.

Where?

Macbeth, Act III, sc. 4, p. 754, 2d column.

Warwick.

How say'st thou, Charles? Shall our condition stand?

Charles.

It shall; only reserv'd, you claim no interest
In any of our towns of garrison.

First p't King Henry VI, Act V, sc. 4, p. 466, 2d column.

Queen Margaret, (to Duchess.)

Richard yet lives, hell's black intelligencer;
Only reserv'd their factor, to buy souls,
And send them thither;—but at hand, at hand,
Ensues his piteous and unpitied end;
Earth gapes, hell burns, fiends roar, saints pray,
To have him suddenly conveyed from hence.

King Richard III, Act IV, sc. 4, p. 549, 1st column.

Cleopatra, (giving a scroll.)

This is the brief of money, plate, and jewels,
I am possessed of; 'tis exactly valu'd;
Not petty things admitted. Where's Seleucus?

Sel.

Here, madam.

Cleo.

This is my treasurer; let him speak, my lord,
Upon his peril, that I have reserv'd
To myself nothing. Speak the truth, Selencus.

Ant. and Cleopatra, Act V, sc. 2, p. 888, 1st column.

Cleo.

O Cæsar, what a wounding shame is this,
That thou, vouchsafing here to visit me,
Doing the honor of thy lordliness
To one so meek, that mine own servant should
Parcel the sum of my disgraces by
Addition of his envy! Say, good Cæsar,
That I some lady trifles have reserv'd,
Immoment toys, things of such dignity
As we greet modern friends withal; and say
Some nobler token I have kept apart
For Sivia and Octavia, to induce
Their mediation.

Ant. and Cleopatra, Act V, sc. 2, p, 888.

Posthumus.

What lady would you choose to assail?

Jachimo.

Yours; whom in constancy, you think, stands so safe. I will lay you ten thousand ducats to your ring, that, commend me to the court where your lady

is, with no more advantage than the opportunity of a second conference, and I will bring from thence that honor of hers, which you imagine so reserved.

Post.

I will wage against your gold, gold to it.—

Cymbeline, Act I, sc. V, p. 895, 1st column.

Titus Andronicus, (to his daughter Lavinia.)

Kind Rome, that hast thus lovingly reserv'd
The cordial of mine age to glad my heart!
Lavinia, live; outlive thy father's days,
And fame's eternal date, for virtue's praise!

Titus Andronicus, Act I, sc. 2, p. 650, 2d column.

Lear, (speaking to Fool of Edgar, who is disguised as a madman.)

What, have his daughters brought him to this pass?
Couldst thou save nothing? Didst thou give them all?

King Lear, Act III, sc. 4, p. 815.

Nor sense to ecstasy was ne'er so thralled
But it reserv'd some quantity of choice,
To serve in such a difference.

Hamlet, Act III, sc. 4, p. 785.

Mr Jas Swayne

Supreme Court of the United States.

OCTOBER TERM, 1875.

NEWHALL
v.
SANGER.
No. 503.

Points of Reply by Mr. Edmunds, for Appellee, to Brief of Messrs. Chester and Britton, submitted by Leave of Court, "for Parties in Interest with Appellant."

I.

The statement on page 2 of the brief, as to the extent of lands and number of people interested, and about the litigation thereon, is denied, because the undersigned has no information upon the subject.

II.

The statement that such lands have been treated by the Interior Department as reserved, and that townships included in such claims were embraced in special executive orders of reservation, is also denied for the same reason, as is also the statement on page 3.

III.

The statement on page 12 of said brief, that "it is a matter of official record in the Interior Department, that a special reservation of the claimed limits of the Moquelamos Rancho was made by executive authority, September 21,

1864," is also denied, upon the ground that a careful search in the Interior Department fails to show any such thing. What the papers in the Interior Department *do* show will be a matter of interest in any case to which they apply, when they come to be properly investigated.

IV.

It is respectfully submitted that it is not a very safe or just practice for counsel, in arguing appeals or writs of error, to undertake to influence the judgment of the court by statements outside of the record, which may be, and generally are, either incorrect or capable of complete explanation.

V.

1st. As to the first point in the argument of said brief, pages 4, 5, and 6, it is submitted that the writer of the brief labors under a misapprehension as to the nature of the suit.

It is not a suit to recover possession of the land at all; but is a suit to have declared void and canceled a certain patent, which object, it is supposed, cannot be attained by an action of ejectment.

2d. It is true, it is to quiet title in the sense of proceeding under the acknowledged head of equity jurisdiction, *quia timet*, to cancel and remove a cloud upon the complainant's title, arising out of a patent for the land irregularly issued. (Story's Equity Jurisprudence, 6th edition, secs. 700, 700*a*, 701, and cases there cited.)

3d. The idea that such a bill is a "bill of peace" is as incorrect as the various statements of extraneous matter contained in the brief. It is certainly not necessary to advise this court of the distinction between the two classes of bills. For the benefit of others, Story's Equity Jurisprudence, chapters 21 and 22, may be referred to.

4th. Under the head of Equity Jurisdiction, upon which the case *does* rest, *i. e.*, that of removing a cloud upon a

good title, it has never yet been supposed by any court or text-writer, so far as I know, that the particular date of the false document, which constitutes the cloud, whether earlier or later than the true title, affected either the question of jurisdiction or relief.

VI.

As to the first point under the second head of argument in the brief, page 6, it is submitted:

1st. That it is too late to press a special demurrer for want of formal exactness of statement in respect of the precise date of definite location and withdrawal. The bill *does* state in general but clear terms that the railroad company acquired a right to the land in question, pursuant to the act of Congress, and that the President of the United States issued to it a patent accordingly. (Record, folio 2.)

It then states that afterwards the false and cloudy patent was issued upon the pretext of the rejection of the Mexican grant, and it avers that that rejection took place at the December term, 1864, and before the reservation of the land for railroads mentioned in the granting acts; but that the authorities issuing the false patent pretended that the rejection took place on the 13th February, 1865, and that said day was after such reservation. The counsel also seem to have forgotton that the statements they criticise respect the circumstances of the issuing of the false and junior patent; and that, it being a junior patent, the orator was not specially bound by any known rule of pleading to show it to be a very good one.

VII.

Dismissing these "glittering technicalities," brought forward, *not* by the defendant in the cause, but by the volunteers, we proceed to the points made in the brief upon the real question:

1st. As to the point on page 7, that the land in ques-

tion was not "public land" at the date when the railroad grant took effect, it is submitted, in addition to what has already been stated in the brief for the appellee, that the lands must have been *something;* and that they never were private lands, but had at all times constituted a part of the public domain, was decided by this court in rejecting the Pico claim. There is no authority for saying that the lands of the United States acquired by conquest or treaty are not "*public* lands," because an unfounded claim may be set up to them, or because they are occupied by private claimants without title, or because they have been specially reserved or appropriated, or because they have not been sold or brought into market, or reserved, or have not been surveyed. The land of the United States surveyed and offered for sale is not made public land by that process, but the process is taken because it was public land in the first place, and proper to be thus proceeded with. It is not the process that creates the thing. It is the *thing* which authorizes the process.

See statutes and authorities referred to in briefs for appellant in the Kansas Land Grant cases, argued at this term, and also the following:

14 Stat., p. 219, sec. 3, "unsurveyed public land."

This court itself uses the terms in the same way. "The United States secured the legal title to the *public lands* in California by treaty, &c.

Fremont's case, 17 How.
Act of 1863, 12 Stat., 754.
" 1818, 3 Stat., 407, § 2.
" 1811, 2 Stat., 618, 619, 620.
" 1866, 14 Stat., 219, 220.

Under the statutes last cited, would the fact that the State *claimed, without right*, certain lands as swamp, crossed by the railroad, raise a reservation in the sense of the act of 1864, or in any sense?

2d. In respect of the point made on the 8th, 9th, and

succeeding pages of the brief, that the land in question, if public land, was reserved, I only desire to say, in addition to what is said in the brief already filed for the appellee, that the very cases cited by the learned counsel, show that the whole scope and effect of the act of 1851 was nothing more than to provide for "the separation of the lands which were *owned* by individuals from the public domain," (Meader *v.* Norton, 11 Wall., 457; United States *v.* Morillo, 1 Wall., 709 ;) and that the provision that lands to which no claim should be presented or title made out should be deemed a part of the public domain of the United States was purely in the nature of a statutory and judicial bar. (Beard *v.* Federy, 3 Wall., 490.)

The act does not say that the land shall b*ecome* part of the public domain, but that they shall *be deemed*, held, and considered such, which is essentially a declaration of a pre-existing fact, judicially ascertained by the method provided in the statute. (Grisar *v.* McDowell, 6 Wall.)

The argument that, on our theory of the meaning of "public lands," the word reserved could be given no efficacy, fails when we consider that it is *public* lands *not* reserved, &c., which are granted; and it necessarily follows that particular public lands might be the subject of reservation, as they always have been. Indeed, reservations can, of course, only be made out of *public* lands. *Private* lands cannot be reserved. The Government has no power over them.

In this connection, it may not be impropér to say, in reference to the only noticable point in another volunteer brief, (alleged to be "for the settlers,") which may or may not have come to the notice of the court, that the use of the words private claims in the surveying acts of 1851 and 1852, found on pages 17 and 18 of the appellee's original brief, import that the private claims are not part of the public lands; that the attempted distinction proceeds upon an entire misapprehension of the meaning of the law. Many (and indeed *all* of the honest) private land claims were *real*, and the land covered by them was private prop-

erty; and the object of Congress was to provide for separating such private property from the public domain. It does not raise the implication that a *false* private claim to public land changes its status, and destroys its character, but it provides merely that claims for locations or allowances *in* the public lands, in behalf of private persons, might, under certain circumstances, be surveyed.

3d. The claims of our opponents, whoever they may be, based upon the 13th section of the act of 1851, must, if sound at all, go to the full extent of declaring that there was no "public domain of the United States" in California between the 3d of March, 1851, and the 3d of March, 1853. I do not care to argue such a question.

As to the third head in the brief under consideration, (p. 12,) it is replied that a reference to the very statute relied upon shows the reverse of what is claimed. For, in the act of 1811, (2 Stat., 620 and 621,) the lands to which private claims might be made, were reserved from disposition by the express declaration of the law. (See secs. 6 and 10.) In the California act no such provision was made; nor was any such ever made afterwards, so far as it respects grants by Congress. And so it is submitted with some confidence that the inference to be drawn from the act of 1811, and other similar ones, is that such lands, unless they turn out to be private property, *are* public lands, and follow the usual course as such, unless Congress *chooses* to declare otherwise. The act of 1866 (14 Stat., 218) furnishes another proof that Congress did not intend by the act of 1851 or of 1853 to hold under injunction all lawful and honest grants and claims, for the sake of false ones, or of speculative preemptors. That act, like the exceptions in the granting act of 1864, to the railroad, protects only "*valid* Mexican grants." Section 6 of the same act distinguishes lands reserved from Mexican grants and from private claims.

Another illustrative test of this question may be drawn from the same act, respecting swamp lands. The State

had a grant of swamp lands. Suppose that, at the time of the definite location of the railroad, the State had claimed as swamp lands those which were not swamp lands at all, could it be pretended that such an erroneous claim defeated the right of the railway company under its grant, to such lands?

Finally, the simple and just meaning of the acts of 1862 and 1864, was that Congress intended thereby to grant to the railroad, upon a valuable consideration, all the land it should have within the designated limits, which, at the time of definite location, it had the just power to dispose of without injury to the *real* rights of other persons, and without inconvenience to itself in respect of special parcels required and reserved for its own use. And it took care to preserve even the holdings of *bona fide* settlers, no matter whether they were occupying lawfully or not. (13 Stat., 358, sec. 4.) And in the act of 1866, under which it is said, in the brief in question, great numbers of honest people have settled upon these railroad lands, whose interests are now to be protected, it is *expressly provided*, in perfect harmony with the act of 1864, that the persons to be protected must be actual and continuous occupants, holding in good faith under a Mexican grant, "*and where no valid adverse right or title exists.*" (Vol. 14, p. 220, sec. 7.) So that, under these acts, the so-called settlers who can possibly be in any danger from a decision of the court in favor of the grant, are only those who were, at the date of definite location, either settlers *mala fide*, or who seized possession of the land after the right of the railway had become fixed, and are thus attempting to appropriate the private property of *other* citizens to their own use, because it has been made valuable by the expenditure of the people's money.

The respect and fidelity that counsel at the bar owe to the court, may excuse me for referring to the appendix (irresponsible and unsigned) attached to the brief, wherein it is insinuated, (apparently with a view of postponing an adverse decision,) that this case is not a *bona fide* one. The statements made are of matters wholly unknown to the undersigned. When counsel have any facts to submit to the court in a proper way upon the subject, undoubtedly the parties to the cause will be ready to meet them. It may be presumed that the unknown author of the appendix had been studying the character mentioned by Burton,—"that holy man, Ketullus, in Nubrigensis, that had an especial grace to see devils."

It is known to this court that the case was not hid under a bushel in the Circuit Court of California, and that it has not been obscure here. It will be remembered that at the last term its advancement was moved by the Attorney General, in order that the decision of the important question involved in it might be speedily had, for the guidance of the executive departments of the Government.

There is filed herewith, for the convenience of the court, a reprint of the decisions of the courts in California, and of the Secretary of the Interior.

GEO. F. EDMUNDS,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 503, OCTOBER TERM, 1875.

G. D. NEWHALL, APPELLANT,
vs.
CHARLES W. SANGER.

Appeal from the Circuit Court of the United States for the District of California.

Brief of Counsel for Appellant.

This is a bill in equity brought against appellant (defendant below) by the appellee, stating that under and by virtue of the several acts of Congress providing for the construction of the Pacific railroad, and in consideration of the performance by the Western Pacific Railroad Company, of the conditions therein prescribed, the President of the United States issued a patent to said company on the 9th day of April, 1870, conveying the S. W. quarter of section 31, in township 3, south of range seven, east Mount Diablo, base and meridian, and that by sundry mesne conveyances the title of said company is vested in complainant.

That subsequent to the date of the patent to said company, another patent was issued by the President of the United States to Ransom Dayton, for said land, and that by divers conveyances said Dayton's title had passed to the defendant. That in said second patent it is recited that the patent to said company was issued by mistake,

for the reason that said land was within the exterior limits of a Mexican grant called Moquelamos, which said grant was rejected at the December term of 1864 of the Supreme Court of the United States, and before the reservation of said land for said company, if the judgment of the court relates to the first day of the term, but after the reservation, if the actual date of the judgment be adopted as the time of its going into effect as respects the reservation for the said company. That complainant claimed to own said land in fee simple; that defendant was in possession of the same, setting up title thereto; that the claim of defendant is a cloud upon complainant's title, and greatly injures the value thereof, and, therefore, he prays that said second patent may be cancelled, and for general relief. To this complaint defendant demurred, and the court overruled the demurrer, and the defendant declining to answer the bill, the court ordered that said second patent be cancelled and that complainants recover possession of the land, (page 4,) and a writ of assistance was ordered to give him possession. Defendant prayed, and was allowed to appeal to this court.—(Page 6.)

Assignment of Errors.

The decree is erroneous in adjudging that complainant is the owner of the land in question.

ARGUMENT.

I. (1) It is only for certain purposes that the fiction of law that a term of court consists of but one day, and that all the judgments of a term relate to the first day of the term, is tolerated at common law. It has no application here. In Gibson vs. Chouteau, 14 Wall, 92, this court says: "The doctrine of relation is a fiction of law adopted by this court solely for the purposes of justice." Is it promotive of this end, or consistent with well-settled principles of construction, to antedate the rejection of a

claim so as to eliminate a saving in a public grant, and thereby make the grant operate against the government?

(2) The grant to the railroad company of the lands "not sold, reserved, &c.," becomes operative only "at the time when the line of said road is definitely fixed." That is "when a map of the same is filed in the Department of the Interior." The 7th section of the act of 1862, 12 Stat., page 493, then requires that the secretary "shall cause the lands within fifteen miles of said designated route or routes to be withindrawn from pre-emption, private entry, and sale, and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off," &c. It is, therefore, when the line of the road is definitely fixed, not when the proclamation by the department takes place, giving notice of the reservation of the land from pre-emption and purchase, which the law prescribes as the date of the operation of the grant. Now the bill alleges that the rejection took place before the notice of reservation for the railroad and does not allege that it was prior to the time when the line of the road was definitely fixed by filing the map designating the route, which was certainly before the notice of the withdrawal given by the department, and may have been prior to the commencement of the term of this court in December, 1864. The grant is held by the circuit court, and we concede correctly, to be a grant in *presenti*, but limited to lands "*not sold, reserved, or otherwise disposed of* * * at the time the line of the road is definitely fixed." The bill does not allege that the claim for the Mexican grant had been rejected when the line was definitely fixed. The circuit court in the case of Sanger vs. Sargent fixes this as the time to ascertain the lands subject to the grant.

II. The grant being a grant in *presenti*, limited to lands "*not sold, reserved*," *&c.*, operates only on such lands as were

subject to it at the date of this act. The difference between grants of the right of way made by the 2d section of the act and the grant of the alternate sections made by the 3d section is remarked upon in the opinion of the court by Mr. Justice Field, in the case of the Central Pacific Railroad Co. vs. Dyer, Hosley, and others, decided in the Circuit Court of the United States for the District of Nevada, in 1871. The court says "the grant of the right of way is a present grant, operating immediately upon the passage of the act, without reservation or exception, and is subject to no conditions except those which are necessarily implied, such as that the roads shall be constructed within the period specified, and be afterwards maintained and used for the purpose designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the 3d section apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the 2d section." Hence, whilst all public land, without regard to reservations, pre-emptions, or homestead rights, is subject to the right of way, pre-emptions and homestead rights and reserves of the public lands existing within the limits of the railroad grant at the time the line of the road is definitely fixed, are exempt from the grant of alternate sections. In this case the court failed to observe this distinction, but, assuming that the land was reserved, says it was nevertheless "public land, not private land. There being no right or title to these lands in any private individual, the proposition that they were always a part of the public domain or public lands of the United States from the time of their cession by Mexico, seems to be so clear that no argument can make it plainer. If a confirmation relates to and takes effect from the date of filing of the petition, or the date of the grant as held in many cases, a rejection must have the same relation."

The court, therefore, held that as the adverse decision finally established that the lands had been public lands all the time, the reservation did not prevent the railroad grant from attaching to them by relation, although the law expressly limits the grant to lands "*not sold, reserved, &c.*, at the time the line of the road is definitely fixed." The answer is, *first*, that the final judgment, it is true, shows that the lands belonged to the United States, but this does not show that they were of that class of public lands which were granted for railroad purposes. *Second.* The act of the 3d of March, 1851, which provides for the proceedings in which the judgment was rendered, withholds from the land the character of "*public land*" till after the judgment has been rendered. The language is: "that all lands, the claims to which *have been* finally rejected, * * * or which *shall be* finally decided to be invalid by the district or supreme court, and all lands, the claims to which *shall not have* been presented * * within two years after the date of this act, *shall* be deemed, held, and considered as part of the public domain." Here is a clear definition of what shall be deemed a part of the public domain, and which alone would pass by that description, either by grant of the executive officers or by act of Congress. *Third.* If there could be any doubt that the proper construction of this language is that the lands in question were to be deemed a part of the public domain only *after* the rejection of the claim, the express exception of them from sale by the 6th section of the act of 1853, would remove that doubt. *Fourth.* The act of March, 1853, 10th Stats., page 244, quoted in appendix, which authorizes pre-emption on lands claimed under former grants after their rejection, in effect declares that prior thereto no rights could attach to such lands—not even the right of pre-emption by settlers, the most favored right under our system—till after they were released from the reservation.

III. But it is insisted that the land in question *is not "reserved" land within the meaning of the sections of the acts of* 1862 *and* 1864 *making the grant.*

1st. The grounds taken by the circuit court are, *first*, that there was no order by the President or other officer of the government reserving them.

2d. That there is no statute reserving them in express terms from this grant to the railroad in consequence of their being "within" the limits of an invalid Mexican grant.

3d. What is "*reserved*" land, is not defined by the railroad acts.

4th. It does not include any lands not reserved already by other acts, or other words or provisions other than the word itself. In other words, we must go outside of that word "reserved" as there used, to other acts to find the lands thus intended to be designated by it.

5th. That the act of 1851, 9 Statutes, page 631, "does not reserve any lands of the United States from any grant that Congress may see fit to make."

6th. The act of 3d March, 1853, 10 Statutes, page 244, does not apply to California lands at all.

7th. The act of same date, *ib.*, page 246, providing for survey, pre-emption, &c., and which excepts from the right of "*pre-emption*" lands claimed under any foreign grant or title, makes no exceptions of such lands from any other grant that Congress may see fit to make.

8th. That there is a distinction between reservations and exceptions, in the act of 1853, and hence, that the word "reserved" in the railroad grant does not apply to the foreign grants which are "excepted" from sale by that act, and that it is only to the lands referred to in the act as "reserved by competent authority" that the word "reserved" is applicable.

(1) The *first* proposition of the court, that the lands in question were not reserved by any executive officer, is not controverted.

(2) The *second* proposition, that there is no statute reserving these lands *in express terms* from the railroad grant, is denied. The lands in question are expressly *reserved from sale* by the 6th section of the act of March 3d, 1853, and such a reservation puts the lands in the category of "reserved" lands. The argument against this being a reservation rests altogether upon the fact that the word "*reserved*" is not used in withdrawing these lands from sale by the 6th section of the act of 1853. But that is not necessary.

The word "*reserved*" applied to land, means land *reserved from sale*, without regard to the terms used to effect the reservation. By the ordinance of 1785, and by every ordinance and act from that day to this, in which Congress has provided for the disposition of public land, a portion of it has been reserved from sale by the executive officers of the government, (not put beyond the power of Congress—that could not be done by a reservation, nothing but a grant could do that,) and the part so withheld from sale by these officers, for whatever object, is called "*reserved land*," meaning only land reserved from sale by the executive officers. Thus the 16th section was reserved by the ordinance of '85, for schools, and that section has invariably been reserved in some form for the same purpose in every succeeding act for the disposition of public lands. Saline and mineral lands have also been generally reserved, and there have been reserves for Indians; for the Illinois canal; for the Wabash canal; for seats of governments of many of the new states; for naval stations, &c., &c. Another class of lands that have been uniformly reserved, were those claimed under foreign grants.—(See act of 1811, 2 Statutes, page 664–5, section 6 and 10, relating to land in territories of Orleans and Louisiana; also, section 10, act of 15th February, 1811, *ib.*, page 620; also, section 3, act of 17th of February, 1818, 3 Statutes, page 407; also, act of 26th May, 1824, 4 Statutes, page 52; also, act of 24th May,

1828, 4 Statutes, page 298; also, 3d section of act of 9th July, 1832, *ib.*, page 567.) The provision in the act of 1811 is in these words: "that till after the decision of Congress thereon, *no tract of land shall be offered* for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming land in the territory of Louisiana."

When, therefore, the act of July, '62, "granted to said company * * every alternate section of public land * * not sold, reserved, or otherwise disposed of," &c., the company got neither the land which was then sold or which was otherwise disposed of, or which was then reserved from sale, whether it was reserved for schools, or because claimed under a Mexican grant, or for any other reason. The only question is whether it was then actually reserved from sale. The phraseology used being immaterial, if the purpose to reserve the land from sale be explicit.

The act of 1853, above quoted, the circuit court says, is "the first act under which rights in the public lands could be originally acquired (in California); and the act relates to this specific subject-matter, and covers and disposes of the entire subject for the present. Section 6th of this act extends the right of pre-emption to California, and excepts from the right of pre-emption lands claimed under any 'foreign grant or title.' But this act makes no exception of such lands as such from any other grant that Congress may see fit to make. Its exception only applies to pre-emption and other rights to be acquired under that act. Besides, the act itself clearly shows that lands claimed under Spanish grants are not intended by Congress to be included under the head of 'reserved' lands, for the language of the act is, 'with the exception of lands' * * * '*reserved by competent authority;*' and

then adds, 'and excepting, *also*, the *lands* claimed under any foreign grant or title.' If it had been supposed that the lands within the exterior boundaries of a Spanish grant could be included in the words 'reserved by competent authority,' the last clause would have been useless. It was not so supposed, but it was intended to add something else. The word 'and' indicates some additional lands. The other word, 'also,' as its definition indicates, shows, too, that there was to be something 'further,' something 'in addition to' the lands already included in the word 'reserved,' excepted from pre-emption rights; and these further or additional lands were 'lands claimed under any foreign grant or title.' All these lands were excepted from the operation of *the pre-emption laws*. They were not reservations. There is a clear distinction between reservations and exceptions. Reservations, in the sense here used, are clearly 'tracts of the public lands reserved for some specific use,' (Webster's dictionary,) such as for forts, military purposes, Indians, and the like, or lands reserved generally *in express terms*."

The court here holds that the 6th section of the act of 1853 does not operate to except the land in question out of the railroad grant, for *two* reasons:

First. Because it only excepts it from pre-emption and other rights to be acquired under that act, but makes no exception of such lands as such from any other grant that Congress may see fit to make.

This statement of itself establishes the reservation by the act of 1853. For, as the court says, under this act, for the first time, rights in the public lands could be originally acquired from the United States, and the act disposed of the entire subject, but, in doing so, these lands were carefully excepted from pre-emption and from all other *rights which could be acquired under the act*, (that is, from being sold by the executive officers in any manner,) and left to the future disposition of Congress.

In excepting these lands from sale, whilst opening the public lands generally to pre-emption and sale, and in not attempting to disable Congress from making any future grant of these lands which it might see fit to make, the act of 1853 conformed strictly to the usual manner of reserving lands, and makes it idle to deny that these lands were "reserved" from sale by that act.

It is, indeed, just because they were so reserved or excepted from sale under that act, and because they are in the condition described by the court, in not being excepted by that act from any other grant that Congress may see fit to make, that they fall within the description of "reserved" lands, which, though Congress might have granted, it did not see fit to grant to the railroad, and therefore expressly excepted by that description from the grant.

The *second* ground upon which the court holds that the act of 1853 does not except these lands from the railroad grant, is because in specifying this among other classes of land which are not to be sold under that act, the word "except" is used in withholding them, whilst the word "reserve" is used in withholding another class from sale under that act. The law, in this way, it is contended, recognizes a distinction between that class of lands which are withheld from sale by the use of the word "reserved," and which, it is said, are alone properly called "*reservations*," and the other classes, which are withheld from sale by the word "except," which should be called "*exceptions*;" and the word "reserved" in the railroad grant, it is said, applies only to the "reservations," and not to the exceptions. Thus, the court arrives at the conclusion that the railroad grant, which in terms excludes from it all "reserved" lands, does not exclude them all, by assuming that the phrase lands "reserved" had a peculiar significance, which was not satisfied by the fact that the lands were withheld from sale, but required that this result should be effected by the word "reserved."

This is a strained construction of the act, and its adoption by the court is the more surprising because the act of 1853, (10 Stat., 244,) which immediately precedes the act under consideration, and to which the court's attention was drawn, as shown by the opinion, completely negatives such a construction. It is an act in *pari materia*, its object being, among other purposes, to extend the right of pre-emption generally to lands which had been withheld from sale because claimed under foreign grants, like those in question here. In this act, which is quoted in the appendix, such lands are called "*reservations*," and the right of pre-emption is extended to all lands *reserved* on account of foreign claims which have been or may hereafter be rejected. And so this court, in the case of Stoddard vs. Chambers, (2 Howard, p. 314,) speaks of the withdrawal from sale effected by the act of 1811, above quoted, as a *reservation*, although the word "reserve" is not contained in it. The application of the phrase lands "reserved" cannot be narrowed, as the circuit court proposes, without its being shown that it is required either by the context or by usage. The contrary usage, however, is shown by the citations already made, and which could be multiplied if necessary, and no attempt is made to show that the context so limits the application of the phrase.

But the language of the act, and the position of the circuit court itself, renders unnecessary any reference to authority. The whole argument of the court is that the lands in question are not reserved, because not reserved by the executive officers. The act declares "that all public lands, * * with the exception of sections 16 and 36, * * and with the exception of lands appropriated under the authority of this act or *reserved by competent authority, and excepting, also, lands claimed under foreign grant*, * * shall be subject to pre-emption, * * and shall be * * offered for sale," &c.

By the terms of the act, therefore, "lands claimed under any foreign grant" are put in the same category by the act as those *reserved by competent authority*. They are added to and included in the exemption from sale which the law extends to the "lands reserved by competent authority." As the court admits that the lands reserved by competent authority are excluded from the railroad grant, it is impossible to include in it those which the act itself expressly includes with them in the same exception and classifies as *reserved* lands.

If the position of the circuit court can be maintained the railroad company could acquire title both within rejected and confirmed claims, and would be enabled to contest the validity of grants, although confirmed and patented by the United States.

MONTGOMERY BLAIR.

OCTOBER, 1875.

APPENDIX.—Synopsis of acts relied on by the parties.

The acts of Congress relied on by complainants, are, 1st, the act of July 1, 1862, 12 Statutes, 489; 2d, act of July 2, 1864, 13 Statutes, 358; 3d, act of March 3, ib., page 504; 4th, joint resolution, May 21, 1866, 14 Statutes, 356.

(1st) The 1st section of the 1st act incorporates the Union Pacific Railroad Company, and authorizes it to construct the road to the western boundary of Nevada Territory. The 2d section, page 491, enacts "That the right of way through the public lands be, and the same hereby is, granted to said company for the construction of said railroad and telegraph line, * * the said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass over the public lands, including all necessary grants for stations," &c.

Section 3, page 492, enacts "That there be, and is hereby, granted to said company, * * every alternate section of public lands, * * on each side of said road, not sold, *reserved*, or otherwise disposed of by the United States, and to which a homestead or pre-emption may not have attached, at the time the line of said road is definitely fixed."

Section 4 provides for appointment of commissioners to examine and report upon the construction of each 40 miles of the road, on whose certificates "patents shall issue conveying the right and title to said lands to said company." Section 5 provides for the issue of bonds by the government to aid in constructing the road. Section 6 declares that the company shall pay the bonds at maturity; keep road in repair; transmit dispatches; transport mails, &c.

Section 7, page 493, requires assent of company and completion of road by July 1, 1874; that within 2 years general route of road shall be designated, and map filed, "Whereupon the Secretary of the Interior shall cause the lands within 15 miles of said designated route or routes

to be withdrawn from pre-emption, private entry, and sale; *and when any portion of said route shall be finally located*, the Secretary of the Interior shall cause the said lands *hereinbefore granted* to be surveyed," &c.

Section 8 fixes commencement and direction of road. Section 9, page 494.—Grants to Union Pacific railroad made to apply to Central Pacific Railroad Company. Section 10 provides existing companies and prescribes time for Central Pacific Railroad Company to file assent, &c. Section 11 increases subsidy on mountains. Section 12 requires uniform width, &c. Section 13 relates to union with Hannibal & St. Joe road. Section 14 relates to road from western boundary of Iowa, to 100th meridian. Sections 15 and 16 relate to connections with other roads and to consolidation. Section 17 relates to forfeitures of franchise in future. Section 18 reserves right to amend and repeal. Section 19 relates to arrangements with telegraph companies.

(2d) The 1st section of the act July 2, 1866, 13 Statutes, page 356, relates to the capital stock of the road. Section 2 relates subscriptions. Section 3d authorizes condemnation of private lands. Section 4th enlarges the grant of public lands for constructing the road, and declares that "any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emptions, homestead, swamp lands, or other lawful claims, or include any government reservations or mineral lands, or the improvements of any 'bona fide' settler."

Section 5 extends time for designating route and filing map. Section 6 modifies provisions as to appointment of commissioners. Section 7 respects reservation of bonds. Section 8 relates to issue of bonds. Section 9 relates to connections of roads. Section 10.—United States takes second mortgage. Section 11 relates to bonds. Section 12 relates to eastern division. Section 13 relates to directors and report. Section 14.—Elections. Section 15.—Road to be one continuous line. Section 16.—May consolidate. Section 17.—Sioux City Branch. Section 18.—Burlington & Missouri River R. R. Co. Section 19.—Land grant to said company. Section 20.—Commissioners. Section 21.—Companies to pay for surveying lands. Section 22.—Congress may amend or repeal.

(3d) The 1st section of act March 3, 1865, 13 Statutes, page 504, authorizes companies to issue bonds.

Section 2 ratifies assignment made by the Central Pacific Railroad Co. to Western Pacific Railroad Co., of the right to construct the road between San José and Sacramento, with all the benefits and privileges of the several acts of Congress relating thereto, requires the 1st section of 20 miles to be completed by July 1st, 1855, and the whole in 4 years thereafter.

(4th) Joint resolution, 14 Statutes, page 356, extends time for construction of first section to January 1st, 1867, upon conditions that the Ex-Mission of San José shall not be included in the grant to said company.

The defendant cites, (1st) the 13th section of the act of 3d March, 1851, 9 Statutes, page 633, (for the settlement of land claims in California,) which declares "that all lands, the claims to which have been finally rejected by the commissioner, herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands, the claims to which shall not have been presented to the said commissioners within 2 years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States."

(2d) Section 6 of the act of March 3d, 1853, 10 Statutes, page 246, which declares "that all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of section 16 & 36, which shall be and are hereby granted to the state for the purpose of public schools in each township, and with the exception of lands appropriated under authority of this act, or reserved by competent authority, and excepting also the lands claimed under foreign grant or title and the mineral lands, shall be subject to the pre-emption laws * * * * * * and shall, after the plats thereof are returned to the register, be offered for sale, * * * and all of said lands that shall remain unsold after having been proclaimed and offered, shall be subject to private entry."

(3d) Act March 3d, 1853, 10 Statutes, page 244, which provides "that the pre-emption laws of the United States as they now exist, be, and the same are hereby, extended over the alternate sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by acts of Congress. * * * Provided further, that any settler who has set-

tled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish, or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and by the act of the 4th September, 1841, * * * after the lands have been released from reservation, in the same manner as if no reservation existed."

(4th) Section 7, act July 23d, 1866, page 220, to quiet land titles in California, which provides "that where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, * * * such purchasers may purchase the same * * * at the minimum price."

G. D. NEWHALL, APPELLANT,

VS.

CHARLES W. SANGER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

OPINIONS

UPON THE

QUESTION INVOLVED IN THE ABOVE CASE

BY THE

Circuit Court of the United States for California,

BY THE

Supreme Court of California,

AND BY THE

Secretary of the Interior.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER.
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1875.

IN THE CIRCUIT COURT OF THE UNITED STATES, OF THE NINTH JUDICIAL CIRCUIT, DISTRICT OF CALFORNIA.

CHARLES W. SANGER v. R. C. SARGENT et al.

1.—CENTRAL PACIFIC RAILROAD GRANT, A PRESENT GRANT.—The grant of alternate sections of land to the Central Pacific Railroad Company, under section 3 of the act of Congress of July 1, 1862 (12 Stat., 492), is a *present* grant of the number of sections designated, which became specific and attached to every alternate section subject to grant lying within the prescribed limits, as soon as the line of the road became "definitely fixed."

2.—SAME.—The grant having attached to the alternate sections the moment the line of the road became "definitely fixed," could only be defeated by a failure of the grantee to perform the conditions subsequent of building the road within the time and in the mode prescribed.

3.—MEXICAN GRANT—RESERVED LANDS.—The fact that some of the alternate sections within the prescribed limits of the grant at the time the line became "definitely fixed" were situate within the exterior limits of land claimed under an invalid Mexican grant, does not constitute such lands "reserved" lands, within the meaning of that term, as used in said section 3 of said act.

4.—SAME.—Lands lying within the exterior boundaries of land claimed under an invalid Mexican grant were a part of the domain of the United States on July 1, 1862, and were not, by reason of such claim *only*, within any of the exceptions mentioned in the act of Congress of that date, or of any of the acts supplementary thereto, granting lands to aid in the construction of the Pacific railroads; and the alternate sections of such lands lying within the prescribed limits, to which no other right had attached at the time the line of the road became "definitely fixed," were within the terms of the grant to the railway company, and the title thereto became irrevocably vested in said company upon the performance of all the conditions prescribed by said several acts.

5.—MEXICAN GRANT—PROCEEDINGS FOR CONFIRMATION.—A decree rejecting a claim to lands under a Mexican grant in proceedings had for a confirmation under the act of 1851, to settle land titles in California, is an adjudication between the claimant and the United States, that the claimant had no title, legal or equitable, and that, as to said claim, the land was always a part of the public domain of the United States from the date of its cession by Mexico.

6.—PATENTEE WHEN TRUSTEE FOR ANOTHER.—When the title to lands vested in the Central Pacific Railroad Company and its assignees, under the act of Congress of 1862, to provide for the construction of the Pacific railroads, and a patent to the same has been subsequently wrongfully issued to another party, a court of equity will convert the patentee in such patent into a trustee for the party in whom the title vested under the act, and compel him to convey such title as he acquired by the patent.

SAWYER, Circuit Judge.

The claimant filed his bill in equity against the defendants for the purpose of establishing his right to certain lands which have been patented by the United States to the defendants, and procuring a decree for the conveyance of such title as passed by virtue of the patents. The complainant claims to be entitled to the lands by virtue of certain acts of Congress, and transactions thereunder set out in the bill, and he alleges that defendants, notwithstanding his right to the lands, have wrongfully procured patents to be issued to themselves. The defendants demur to the bill, and the question to be determined is, whether the facts alleged, taken to be true, entitle complainant to the relief sought. According to

the allegations of the bill, complainant has acquired by proper mesne conveyances all the right, title, and interest vested in the Central Pacific and Western Pacific Railroad Companies, under the act of Congress granting lands to said corporations to aid in the construction of the Western Pacific railroad. The right of the complainant depends upon whether the said corporations under which he claims acquired a right to the land under the acts of Congress set out in the bill. Section 3 of the act of July 1, 1862, "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," etc., provides as follows:

"That there *be* and *is hereby granted* to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, *every alternate section* of public land, *designated by odd numbers*, to the amount of *five alternate sections per mile on each side of said railroad*, on the line thereof, and within the limits of ten miles on each side of said road, *not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.*"—(12 Stat., 492.)

That this section constitutes a *present* grant of the number of sections mentioned, which becomes definitely attached to the specific alternate sections situate within the limits prescribed in the act, not reserved or excepted by virtue of the words of reservation or exception, as soon as "the line of said road is definitely fixed," there can be no doubt. This is both clearly apparent from the language of the act itself, and is thoroughly settled by judicial construction in many cases wherein the language is precisely similar.—(Doll v. Meader, 16 Cal., 315; Van Valkinburg v. McCloud, 21 Cal., 335; Higgins v. Haughton, 25 Cal., 255; Bludworth v. Lake, 33 Cal., 261; Chapman v. School Dist. et al., 1 Deady, 108; Lamb v. Davenport, 1 Sawyer, 632; Cent. Pac. R. R. Co. v. Dyer et al., 1 Sawyer, 652; Lessieur v. Price, 12 How., 75–6; Foley v. Harrison, 15 How., 446, 591; Railroad Co. v. Smith, 9 Wall., 99, 100, 97; Railroad Co. v. Fremont county, 9 Wall., 94–5.)

This grant could only be defeated by a failure to perform the conditions of building the road as prescribed. When the line of the road became "*definitely fixed*" in the mode prescribed, the right of the railroad companies under which complainant claims attached to every alternate section of the public land within the limits prescribed of ten miles on each side of the road, which was not mineral lands, had not at that time been "sold, reserved, or otherwise disposed of" by the United States, and to which a pre-emption or homestead claim, or some other right under the statutes, had not attached. A subsequent act extended the grant to *ten* instead of *five* sections, to be selected within *twenty* miles on each side of the line, and defined the exceptions in more specific terms, which in no way affect the question at issue. Upon the filing by the company of a map designating the general route of the road, the acts with the amendments also authorized the Secretary of the Interior to withdraw the land within twenty-five miles of such designated route from pre-emption, private entry, or sale. The bill alleges that said map was filed, designating the general route, October 5, 1864, and that on December 1, 1864, the Secretary of the Interior withdrew the lands

within twenty-five miles of the route so designated from pre-emption, private entry, or sale.

The bill avers that the lands in question are within the prescribed limits; were, at the time of the said withdrawal, and "*at the time when the line of the said road was definitely fixed*," public lands of the United States, and were alternate sections designated by odd numbers, and not within any of the said exceptions mentioned in any of the said acts. If this be so, then the right of the company vested and became perfect, and it was entitled to a patent upon fulfilling the prescribed conditions, and no other party could acquire any right under the laws in force against the said railroad corporations, after the line of the said road became "definitely fixed," and the grant had become thus attached to these specific tracts.—(See cases before cited.)

The only ground upon which it is claimed that these lands are within the exception, and therefore excluded from the grant, is, that they had been "*reserved*." The bill alleges in direct terms that they had not been reserved. The bill, however, makes the further allegation that the *only* reason that patents were not issued to complainant was, "that at the date of the final location of the road there was a claim to said land under a Mexican grant, which said claim was without any foundation, and was wholly void, and was finally rejected by the Supreme Court of the United States in December term of 1864, long before said portion of said road was completed that gave the right to the said lands; and the said Mexican claim was rejected because the alleged grant on which the claim was founded was a fraud, and was absolutely void." That it was pretended by the officers of the government "that the fact of said lands being so claimed made them '*reserved*' under the act of Congress, whether said claim was just or unjust, legal or illegal, and that on this account alone" the issue of a patent to complainant was refused. This allegation presents the only other question in the case on the merits, viz: whether the mere fact that the lands in question at the time of the filing of the map required, the withdrawal from pre-emption, private entry, or sale, and the time of the final location of the line of the road, were within the exterior boundaries of a tract claimed under a Mexican grant, whether fraudulent or genuine, of itself constitutes them *lands* "*reserved*," within the meaning of the section making the grant. It does not appear, and it is not claimed, that before said definite location, or at any time, there was, in fact, any actual order of the President, or of any department, or officer of the government, authorized to make one, made, reserving these specific lands, or any lands within the external boundaries of this pretended grant. That the lands were public lands there can be no doubt. The fact that they were claimed under a fraudulent and invalid Mexican grant did not prevent them being public lands.

The final rejection of the grant did not change the ownership of the lands from the claimant to the United States. It was only an adjudication—a judicial determination—that the grant was invalid, and that the claimant never had any right whatever, legal or equitable, entitled to recognition under the treaty with Mexico; or, in other words, an adjudication in a litigation between the only party setting up any claim, and the United States, that the entire title was in the United States; and that the lands were *public, not private*, lands. There being no right or title to these lands in any private individual, the proposition that they

were always a part of the public domain, or public lands of the United States, from the time of their cession by Mexico, seems to be so clear that no argument can make it plainer. If a confirmation relates to and takes effect from the date of the filing of the petition or the date of the grant, as held in many cases, a rejection must have the same relation. But there is no occasion to apply the doctrine of relation. Being public lands, they were subject to grant, and were granted, unless within some one of the exceptions made in the granting act. It is not pretended that they are within any exception, unless it be under the head of "reserved" lands.

As before stated, it is not pretended there was any specific order by any competent authority reserving these lands, or any lands embracing these, unless they are reserved by force of some statute without any further act by any department or officer of the government. No statute has been called to my attention reserving them in express terms from this grant to the railroad in consequence of their being within the external limits, or otherwise, of a Mexican grant. The word "reserved" itself, as used in the railroad acts, does not profess to point out what lands are reserved, within the meaning of the act. It does not attempt to *define* "reserved" land. It does not include any lands not reserved already by other acts, or other words or provisions, other than the word itself. In other words, we must go outside of that word "reserved," as there used, to other acts to find the lands intended to be designated by it. And going outside of this word, I have been referred to no statute, and I have not found any, that appears to me to reserve these lands from grant. I find nothing in the act of 1851 to settle private land claims in California, reserving any lands of the United States from any grant that Congress may see fit to make. So far as I am aware, that act is the first one passed affecting the titles to land in California. There were no public lands at that time open to sale or pre-emption in the State of California. There were at that time no means by which private rights not already vested or initiated under the laws of Mexico, could be acquired in any of the public domain of California. As the said act did not provide for any disposition of the public lands, other than to ascertain what grants had already been made by the Mexican government, and to perfect the rights inchoate or otherwise in the said grants, and there was no other law by means of which any pre-emption or other rights could be acquired in the public lands in California, and the President having the power already to reserve any land for the government's specific uses, there was no occasion for making any general reservation in that act to avoid future complications, and none was made. The whole scope and purpose of the act was to ascertain what lands belonged already to private parties, and what to the public domain; and this object must be kept in view in its construction. The disposition of the public lands to private parties was left for future legislation.

The next act, so far as I am advised, affecting the public lands in California, is in the appropriation made for the survey of the public lands in that state in 1852.—(10 Stat., 90–1.) This act authorizes the dividing of a certain amount of the public lands into townships and sections. Also, the survey of private claims under Mexican grants presented in good faith for confirmation. But it only authorizes the survey of such *unconfirmed* grants "*as the gradual extensions of the lines of the*

public surveys as he (the Surveyor-General) shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation." What does this mean? Certainly not that all lands within the exterior boundaries of a Spanish grant shall be reserved from survey, or reserved at all. On the contrary, it expressly authorizes the Surveyor-General, when, in extending the lines of the public surveys, he comes upon an unconfirmed Spanish grant of the usual kind, which he is satisfied is good, and ought to be respected, to survey it "in advance of confirmation," in order that he *may survey as public lands the surplus after satisfying the grant*, and thus prepare it for sale as soon as Congress should see fit to authorize its disposition. Congress had no idea in passing this act that all lands within the exterior boundaries of a grant which sometimes embraced ten times the amount of land required to satisfy the grant, had been reserved for any purpose, and certainly up to this time there had been no such reservation.

The act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned" (10 Stat., 244), clearly has no application. It had reference to prior legislation applicable to lands in the older states. There was nothing, at the time of the passage of this act, in California to which it could apply. But afterwards, on the same day, the next act was passed by Congress relating to lands in California—the act of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat., 244–8). This appears to be the first act under which rights in the public lands, as against the United States, could be originally acquired, and this act relates to the specific subject-matter, and covers and disposes of the entire subject for the present. Section 6 of this act extends the right of pre-emption to California, and excepts from the right of "*pre-emption* lands claimed under any foreign grant or title." But this act makes no exception of such lands as such from any other grant that Congress may afterwards see fit to make. Its exception only applies to *pre-emption* and other rights to be acquired *under that act*. Besides, the act itself clearly shows that lands claimed under Spanish grants are not intended by Congress to be included under the head of "*reserved*" lands; for the language of this act is, "with the exception of lands * * * * *reserved by competent authority*," and then adds, "and excepting *also* the *lands claimed under any foreign grant or title.*" If it had been supposed that the lands within the exterior boundaries of a Spanish grant would be included in the words "reserved by competent authority," the last clause would have been useless. It was not so supposed, but it was intended to add something else. The word "and" indicates some additional lands. The other word, "also," as its definition indicates, shows, too, that there was to be something "further," something "in addition to" the lands already included in the word "reserved," excepted from pre-emption rights; and these further or additional lands were "lands claimed under any foreign grant or title." All these lands were excepted from the operation of *the pre-emption laws*. They were not reservations. There is a clear distinction between reservations and exceptions. Reservations in the sense here used are clearly "tracts of the public lands reserved for some specific use" (Webster's Dic.), such as for forts, military purposes, Indians, and the like, or lands reserved generally *in express terms.*

All reservations of this kind, and also lands claimed under Mexican grants, were alike "excepted" from the operation of the pre-emption laws. Lands "reserved by competent authority" were excepted, and so were lands claimed under Spanish grants *excepted*, not *reserved*. So in like manner, under the railroad acts in question, the term "reserved," is manifestly used in the same sense, and all lands so "reserved" sold, or otherwise disposed of, all lands to which a pre-emption or homestead right had attached, *were excepted* from the operation of the grant.

The act of Congress in relation to Mexican grants *in New Mexico* also provides that, "until the final action of Congress on *such claims, all lands covered thereby shall be reserved from sale or otherwise disposed of by the government, and shall not be subject to the donations granted by the provisions of this act.*" (10 Stat., 309, sec. 8.) This is as specific on this point as the act extending pre-emption rights to California.

Thus it is apparent that whenever Congress designs to except from the operation of any legislative grant, or reserve from sale, those portions of the public lands lying within the bounds of any tract claimed under a Mexican grant, it has no difficulty in finding and using apt language to express the intent clearly and explicitly; and with these *former acts* before that body it can hardly be supposed that Congress would have failed to use appropriate words to exclude this class of lands in the railroad grants had such been the design. I have mentioned the only acts relied on, and they are the only ones I have found from which a statutory reservation can be deduced, independent of any specific order by some officer of competent authority reserving the lands. It is not pretended that there is found any express reservation in either or all of these acts; and to my mind none can be implied by any reasonable construction. Besides, I find nothing in the policy of the grant that would justify any such strained construction or implication.

The policy of the act was to give to the railroad company every alternate section of the public domain within ten miles on each side of the road, to which no private right had attached, and not already appropriated to some specific public use, to aid in the construction of this great public improvement. The donation was designed to be and was liberal. If reservations of this kind could be worked out by shadowy implication in extended sections of the country, there would be no land granted, and no aid thereby conferred. This grant is to receive a reasonable construction, in view of the public object to be accomplished; and so construing it, it is obvious that the act granted everything within the general descriptions not taken out by specific enumeration. And the lands in question are, in my judgment, clearly not within the meaning of any one of the classes enumerated. The railroad act does not define its exceptions by reference to the pre-emption laws as a test. It names specifically each class intended to be excluded, and each has a subject-matter upon which it can clearly operate, without embracing lands of the class in question. I am satisfied that the lands in question are within the grant to the Central Pacific Railroad Company.

The Central Pacific Railroad Company having filed its assent to the act, in pursuance of the provisions of section 7, it was not necessary for the Western Pacific railroad to repeat it after the assignment. Whatever rights the Central Pacific Railroad Company had acquired passed to the Western Pacific Railroad Company by the assignment and confirma-

tion thereof by the subsequent acts of Congress. Wherever any of the conditions prescribed by the acts of Congress had been duly and fully performed by the Central Pacific Railroad Company before the assignment, the rights thereby acquired enured to the benefit of its assignee, the Western Pacific Railroad Company, and it was not necessary for the latter to perform them again. But this and other objections of a technical character made at the argument, worthy of any serious consideration, have been obviated by the amendments recently filed by leave of the court. It is true that the bill, as now amended, does not aver the precise time when the line became "definitely fixed," but it does aver that no right had attached at the time it became "definitely fixed." This is the controlling fact, and I think it sufficient.

Upon the allegations of the bill, I am satisfied that the right to patents to the lands in question vested in the complainant's grantors, and that the patents thereto in question were wrongfully issued to defendants. Upon well-settled principles of equity jurisprudence, "where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title."—(Stark v. Starrs, 6 Wall., 419; Silver v. Ladd, 7 Wal., 228; Garland v. Wynn, 20 How., 6; Lindsey v. Hawes, 2 Black, 554; Johnson v. Towsley, 13 Wall., 73; Bludworth v. Lake, 33 Cal., 261; Salmon v. Symonds, 30 Cal., 306; Wasley v. Foreman, 38 Cal., 91.)

This case is within the principle. The demurrer must be overruled, and it is so ordered, with leave to answer on or before the next rule day.

Rendered September 16, 1874.

CALIFORNIA SUPREME COURT DECISIONS.

JANUARY TERM, 1875.

EJECTMENT—RAILROAD LANDS—PATENT—MEXICAN GRANT.

Opinion by RHODES, J.; full bench concurring.

[Filed March 15, 1875.]

C. P. R. R. Co.
vs.
YOLLAND. } No. 3490.

This is an action of ejectment to recover the possession of the northwest quarter of the northwest quarter of section 33, township 3 north, of range 6 east, Mount Diable base and meridian. The plaintiff claims title under a patent issued by the United States to the Western Pacific Railroad Company, on the 9th day of April, 1870, in pursuance of the acts of Congress of July 1, 1862, July 2, 1864, and March 3, 1865, and the joint resolution of May 21, 1866, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean. The land is within the twenty-mile limits on each side of the road, and within the limits of

the reservation made by the Commissioner of the General Land Office on the 23d day of December, 1864.

The land is within the exterior limits of the alleged Mexican grant of eleven leagues of land called the "Los Moquelumnes," and claimed by Andreas Pico, who executed to the defendant a deed purporting to convey the land. The claim of Pico was finally rejected by the Supreme Court of the United States on the 13th day of February, 1865. The defendant has been in the possession of the land since 1865, and after the passage of the act of Congress of July 23, 1866, he made proof of his claim in compliance with said act and paid for the land; and on the 5th day of October, 1871, the United States issued to him a patent for the land.

The action was tried by the court without a jury, and the court, without filing any findings of fact, decided for the defendant, and judgment was entered accordingly; and afterwards the plaintiff's motion for a new trial was denied.

The question involved in the case is whether lands claimed under a grant made by the Mexican Government, the claim to which was pending in the courts of the United States when the acts of Congress to aid in the construction of the railroad above referred to were passed, and which was finally rejected by the Supreme Court of the United States, were reserved from the grant of lands to the railroad company.

The act of July 1, 1862, grants "every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad on the line thereof and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

The act of July 2, 1864, provides that the lands granted "shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any bona-fide settler," etc.

The only words in these acts upon which the defendant can rely as excluding the lands in this case from the grant to the railroad are the words "reserved * * * by the United States," in the act of 1862; and the words "any Government reservation," in the act of 1864—that is to say, if the lands were not reserved by the United States or did not form a portion of a Government reservation, they were included in the grant to the railroad.

In our opinion the lands were not reserved by the United States, nor did they constitute a portion of a Government reservation within the meaning of the words of the act of Congress above mentioned.

It is unnecessary at this time to enter upon an argument to sustain this construction of the acts of Congress; for there are many tracts of land in this State, the title to which depends upon the interpretation to be given to those acts; and the parties in interest, it may be assumed, will apply to the appropriate tribunal—the Supreme Court of the United States—for a final determination of the question.

There being no finding nor any agreed statement of the facts upon which the plaintiff's title depends, and the implied findings being in favor of defendant—the cause having been tried before the Code of

Civil Procedure took effect—judgment cannot be ordered to be entered in favor of the plaintiff without a violation of a well-recognized rule of practice.

Judgment and order reversed and cause remanded for a new trial.

PER CURIAM.

[Filed March 15, 1875.]

McLAUGHLIN vs. COFFEE. } No. 3512.

Order and judgment reversed and cause remanded for a new trial on the authority of Central Pacific R. R. Company vs. Yolland, No. 3490, decided at the present term.

PER CURIAM.

[Filed March 15, 1875.]

McLAUGHLIN vs. ALLISON. } No. 3511.

On the authority of Central Pacific R. R. Company vs. Yolland, No. 3490, decided at the present term, the order and judgment in this case are reversed and the cause remanded for a new trial.

RAILROAD LANDS.

Opinion by RHODES, J.; WALLACE, Ch. J., CROCKETT, NILES, JJ., concurring.

[Filed March 15, 1875.]

KAISER vs. McLAUGHLIN. } No. 3513.

The plaintiff purchased from the defendant, McLaughlin, the northwest quarter of section 11, township 3 south, range 7 east, for $1,600, of which sum $800 was paid in hand, and the remainder was to be paid in one year from the date of the contract, June 1, 1867. The defendant agreed to convey the land to the plaintiff after the Western Pacific Railroad Company should receive a patent therefor from the United States, and twenty days after a demand for the deed. The plaintiff sues to recover back the first installment of the purchase money paid by him, on the ground that the land was excepted from the grant made by the act of Congress of July 1, 1862, and July 2, 1864, to the railroad company, because it was then within the limits of an alleged Mexican grant, which was claimed by one John Rowland. The last step in the proceedings taken by the claimant for the confirmation of his claim was the granting of an appeal by the District Court of the United States for the District of California, to the Supreme Court, from the decree of the District Court rejecting the claim of Rowland; but the required bond does not appear to have been given nor the appeal to have in fact been taken. The decree of the District Court rejecting the claim therefore remains in full force.

The question here presented is the same as that in C. P. R. R. Co. vs. Yolland, No. 3490, and C. P. R. R. Co. vs. Robinson, No. 3491, and upon the authority of those cases judgment and order reversed and cause remanded for a new trial.

TITLE—SELECTION OF PUBLIC LANDS.

Opinion by RHODES, J.; CROCKETT, J., WALLACE, Ch. J., NILES, J., concurring.

[Filed March 15, 1875.]

C. P. R. R. Co. vs. ROBINSON. } No. 3491.

The evidence upon which the plaintiff relies to prove title is the same as that which was introduced in C. P. R. R. Co. vs. Yolland, No. 3490. The plat of the survey of the township was returned to the proper land office on the 18th day of October, 1865. The land in controversy is within the exterior limits of the alleged grant of "Los Moquelumnes," the claim to which was finally rejected in 1865.

The defendant has lived upon the land for more than twenty years. In 1862 he purchased the land from this State as lieu land—land selected in lieu of an equivalent portion of a 16th or 36th section—paid the requisite sum of money and has since paid the annual interest on the remainder of the purchase money up to January, 1872. The State selected the land for the defendant as lieu land in 1871; and in October of that year the United States listed the land to the State.

The selection of the land by the defendant in 1862 was, as this court has often decided, unauthorized and void, because the land at that time had not been surveyed by the United States.

The selection of the lands by the State in 1871, and the listing of it by the United States to this State was subsequent to the issuing of the patent under which the plaintiff claims title; and that patent conveyed the title, if the lands were not excepted from the grant to the railroad company, by reason of their being within the exterior limits of an alleged Mexican grant, the claim to which was afterwards, but before the issuing of the patent, rejected by the Supreme Court of the United States.

Upon the authority of the C. P. R. R. Company vs. Yolland, No. 3490, we hold that the lands were not excepted from the operation of the acts of Congress of July 1, 1862, and July 2, 1864, granting lands to aid in the construction of the railroad.

As no right or title in or to the lands appears to have vested in either the State or the defendant prior to the passage of the act of July 2, 1864, it is obvious that neither the act of July 23, 1866, to quiet land titles in California, nor any proceedings taken under the act, could defeat or impair the grant to the railroad company—that is to say, assuming that the lands in controversy are a portion of the lands to which the grant made by the acts of July 1, 1862, and July 2, 1864, extended. The act of July 23, 1866, by providing for the confirmation of certain selections of land by, or in behalf of the State, which were void when the act passed, did not have the effect to impair the grant to the railroad company.

For the reasons stated in C. P. R. R. Co. vs. Yolland, *supra*, judgment will not be directed to be entered for the plaintiff.

Judgment and order reversed and cause remanded for a new trial.

WESTERN PACIFIC RAILROAD COMPANY vs. H. E. DILLINGHAM ET AL.

1.—By the 4th section of the act of July 2, 1864, (13 Stat., 358,) Congress intended to revise the subject of what lands should be excluded from the grant, (sec. 3, act July 1, 1862, 12 Stat., 493,) and intended that the said 4th section should take the place of and stand as a substitute for so much of the 3d section, (act 1862,) as related to the *description* of the lands to be excluded from the grant.

2. SAME.—The fourth section, act July 2, 1864, amends the 3d section, act July 1, 1862, by striking out the word "five," where the same occurs, and inserting the word "ten;" and then contains the clause that, "any lands granted by this act, *or the act to which this is an amendment*, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim; nor include any *Government reservations*, or mineral lands."

3. SAME.—The said 4th section omits the words "not sold, reserved, or otherwise disposed of by the United States," found in the 3d section, and substitutes therefor the words "swamp-land, or other lawful claim, *nor include any Government reservation*."

HENCE:

4.—The only reservation that can operate to except the lands in controversy from the grant is a "*Government reservation*."

5.—In this case the Hon. Secretary of the Interior followed the decision of the Circuit Court of the United States for the District of California in the case of Charles W. Sanger v. R. C. Sargent et al, wherein the court held as follows:

First. "CENTRAL PACIFIC R. R GRANT, A PRESENT GRANT.—The grant of alternate sections of land to the Central Pacific Railroad Company, under section 3 of the act of Congress of July 1, 1862 (12 Stat., 492), is a *present* grant of the number of sections designated, which became specific and attached to every alternate section subject to grant lying within the prescribed limits, as soon as the line of the road becomes 'definitely fixed.'

Second. "SAME.—The grant having attached to the alternate sections the moment the line of the road became 'definitely fixed,' could only be defeated by a failure of the grantee to perform the conditions subsequent of building the road within the time, and in the mode, prescribed.

Third. "MEXICAN GRANTS —RESERVED LANDS.—The fact that some of the alternate sections within the prescribed limits of the grant, at the time the line became 'definately fixed,' were situate within the exterior limits of land claimed under an invalid Mexican grant, does not constitute such lands 'reserved' lands, within the meaning of that term, as used in said section 3 of said act.

Fourth. "SAME.—Lands lying within exterior boundaries of land claimed under an invalid Mexican grant, were a part of the domain of the United States on July 1, 1862, and were not, by reason of such claim *only*, within any of the exceptions mentioned in the act of Congress of that date, or of any of the acts supplementary thereto, granting lands to aid in the construction of the Pacific Railroads; and the alternate sections of such lands, lying within the prescribed limits, to which no other right had attached at the time the line of the road became 'definitely fixed,' were within the terms of the grant to the railway company, and the title thereto became irrevocably vested in said company upon the performance of all the conditions prescribed by said several acts."

(*See Pacific Law Reporter, Vol. VIII., No.* 12, *Sept.* 22, 1874.)

HELD.—That the lands in contest were not excluded from the grant by reason of their having been within the claimed limits of the private land claim "Los Medanos" at the time of the definite location of the line of the road, and subsequently excluded from the confirmed claim, but were "public lands" at the date of the definite location and subject to the grant.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 14, 1875.

SIR: I have examined the case of the Western Pacific Railroad Company v. H. E. Dillingham et al., involving title to certain lands in Tp.

2, N. R. 1 E., M. D. M., San Francisco, California, on appeal from your decision of June 26, 1874.

The lands are within the limits of the grant to said railroad, and were withdrawn January 30, 1865.

The line of the road was definitely located in April, 1868. The several defendants made their respective settlements after the withdrawal, and most of them after the definite location of the road, with the exception of M. H. Boothby. He settled in November, 1864, and has a better title than the railroad company.

The other defendants settled after the lands were withdrawn for the benefit of the railroad, and their rights are inferior to those of the railroad, unless the lands were excluded from the grant to the company. They were included, at the time of definite location, within the claimed limits of the private land claim, "Los Mendanos," but were excluded from the confirmed claim by final decree in 1869, which was after the definite location of the road.

This case, therefore, presents the naked question whether lands in California, included within the exterior boundaries of a private land claim, at the time the final location of the line of the road is made, but afterwards excluded from the confirmed grant and survey, pass to the Western Pacific Railroad Company, or become public lands, liable to pre-emption entry.

It is claimed by the company that they are included in the grant, and by the defendants, that they are "reserved," and therefore excluded from the same.

At the outset of this inquiry it is important to carefully consider the language in which the grant is made, and ascertain, if possible, its true signification. The grant is made by the 3d section of the act of July 1, 1862, (12 Stat., 493,) and the 4th section of the act of July 2, 1864, (13 Stat., 358,) and the second section of the act of March 3, 1865, (13 Stat., 504.)

The said 3d section grants to the company "every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of road is definitely fixed, *Provided*, that all mineral lands shall be excluded from the operations of this act."

The fourth section of the act of 1864, in terms amends the said 3d section by striking out the word "five," where the same occurs, and inserting the word "ten;" and then goes on to provide, that, any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any Government reservation or mineral lands.

What is the meaning of the word "reserved" as used in the said 3d section?

The context would seem to indicate that the reservation referred to was one made by the United States for some such purpose as the Government usually creates reservations. Such is the natural meaning of the words in the connection in which they are found. "Sold and reserved," or othewise disposed of by the United States.

The word "otherwise," as thus used, fairly implies that the sale and reservation, immediately preceding, were made by the United States.

If there be doubt about the meaning of the word "reserved," as used in the 3d section of the act of 1862, that doubt is, I think, removed by the 4th section of the act of 1864.

The 4th section expressly, and in terms, amends section three, in the manner I have before stated, and then contains the important clause that, "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any *Government reservation*, or mineral lands."

It will be observed that the description of the lands granted by the third section is left unchanged by the fourth section. The only change relates to those lands which are excepted from the grant. Both sections enumerate pre-emption and homestead claims and mineral lands.

The 4th omits the words "not sold, reserved, or otherwise disposed of by the United States," found in the 3d section, and substitutes therefor the words "swamp-land, or other lawful claim, nor include any Government reservation."

Now the plain inference to be derived from this legislation is that Congress intended to revise the subject of what lands should be excluded from the grant, and intended that the fourth section should take the place of and stand as a substitute for so much of the third section as related to the description of the lands to be excluded from the grant. Else why did it repeat homestead and pre-emption claims, and mineral lands in the fourth section?

If it was intended simply to *enlarge* the third section there was no occasion for repeating what was already clearly and explicitly provided for in that section. Upon the authority of Murdock v. City of Memphis, 20 Wall., 616, I should have no hesitation in holding that the fourth section was an implied repeal of that portion of the third section which relates to the lands excluded from the grant, if the fourth section did not purport to amend the third section, which it does, and therefore it is not necessary to hold that there is a repeal by implication. In the case, Murdock v. City of Memphis, the question arose whether the 25th section of the judiciary act of 1789 was repealed by the 2d section of the act of 1867.

MILLER, Judge, in delivering the opinion of the court, said:

"The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning; and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.

"A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter, to which they both had reference, to make such changes in the

law as it stood, as they thought best, and to substitute their will in that regard entirely for the old law on the subject. We are of opinion that it was their intention to make a new law, so far as the present law differed from the former; and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. U. S. v. Tynea, 11 Wall., 88; Henderson, Tobacco, 11 Wall., 652; Bartlett v. King, 12 Mass., 537; Cincinnati v. Cody, 10 Pick., 36; Sedg. on Stat., 126.

"The results of this reasoning are, that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is, of course, the law now, and has been ever since it was first made so. What is changed or modified is the law, as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved."

If I am correct, in the construction I have given this fourth section, then the only reservation that can operate to except the lands in controversy from the grant, is a "*Government reservation*," and there is no pretence that any such reservation has ever been created.

But the case does not rest upon this view alone; there are others that require consideration.

The final rejection of these lands from the confirmed grant did not change their ownership. They were then the property of the United States, and being the property of the United States and being undisposed of, they were subject to disposal by the United States, and subject to being granted to a railroad company. The granting clause in the acts now under consideration clearly embraces them, unless they were within the exception of "reserved" lands. There is no statute that in terms makes lands within the claimed limits of a Mexican grant, but finally excluded from the survey, "reserved" lands. And there is no order, by any competent authority, that purports to have that effect. I have carefully examined the legislation in regard to the public lands in California, and I can find nothing that declares such lands to be "reserved."

The first act on this subject was the act of March 3d, 1851, (9th Stat., 631.) That did not undertake to dispose of the public lands.

Its scope and aim was to ascertain what lands belonged to private parties and what were public lands.

The next legislation, in the order of time, was that of August 31, 1852, (10 Stat., 91.) It was embraced in an act making appropriations for the civil and diplomatic expenses of the Government, and made an appropriation for the survey of the private claims, in that State, that had been presented in good faith to the Board of Land Commissioners. It also authorized the Surveyor-General of that State to survey such unconfirmed claims as the extension of his public surveys should "find within the immediate sphere of his operations, and which he is satisfied ought to be respected, and actually surveyed in advance of confirmation."

It did not undertake to declare what should be done with such unconfirmed claims when surveyed, or to provide that they should be free from disposal by the United States.

The act relied upon to make the lands in controversy "reserved," is the act of March 3, 1853, (10th Stat., 244.)

That act is entitled "An act to extend pre-emption rights to certain lands therein mentioned." It provided "that the pre-emption laws of the United States, as they now exist, be and they are hereby extended over the alternate *reserved* sections of public lands, along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of Congress; and that it shall be the privilege of persons residing on any of said *reserved* lands to pay for the same in soldiers' bounty-land warrants, estimated at a dollar and twenty-five cents per acre; or in gold or silver, or in both, in preference to any other person, and at any time before the same shall be offered for sale at auction."

It further provides that no persons should be entitled to the benefits of said act except such persons as had settled and improved such lands, prior to the final allotment of the alternate sections to the railroads, by the General Land Office. And it concluded with the following:

"*Provided* further, that any settler who has settled or may hereafter settle on lands *heretofore reserved* on account of claims under French, Spanish, or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of 4th of September, 1841, entitled 'An act to appropriate the proceeds of the public lands, and to grant pre-emption rights,' after the land shall have been released from reservation, in the same manner as if no reservation existed."

In analyzing this statute it will be noticed that the even sections along the granted limits to railroads are called "reserved sections;" that it speaks only of lands "*heretofore reserved;*" and that in enumerating the claims, under foreign grants, it speaks of French and Spanish grants, and makes no *mention of Mexican grants*, while the acts of 1851 and 1852 particularly specify Mexican grants.

If it had been intended that this legislation should apply to the State of California, some portions of which were almost literally covered with Mexican grants, how does it happen that no mention is made of them by name?

It would have been the most natural thing in the world to have named them specifically, and the fact that they are entirely omitted in the specifications of foreign grants is very strong evidence that the State of California was not in the mind of the law makers when the act was passed.

There were no reservations in California *theretofore* reserved. There was, at that date, no statute authorizing pre-emption claims in California. There were reservations outside of California *theretofore* created by statute for said act to operate upon. Such were the acts of 1805, 1806 and 1807 (2 Stats., 325, 391, 440), the acts of March 3, 1803, March 31, 1808, February 15, 1811 (2 Stats., 232, 480, 617.) The acts of March 26, 1804, April 21, 1806 (2 Stats., 279 and 395) protected from sale the tracts duly claimed and identified and embraced in the report of the commissioners "till after the final decision of Congress thereon," and a similar provision applied to the State of Missouri, act of July 9, 1832 (4

Stat., 567.) A like provision applied to Louisiana, act of March 3, 1811 (2 Stat., 662.)

These considerations satisfy my mind that Congress did not intend that the said act of March 3, 1853, should apply to the State of California.

It did immediately thereafter, and on the said 3d of March, 1853, pass an act which did unequivocally apply to the State of California, and which was entitled "An act to provide for the survey of the public lands in California, the *granting of pre-emption rights therein*, and for other purposes." (10 Stat., 244.) This was the first act under which original rights could be acquired in the public lands of that State as against the United States.

Its language is utterly inconsistent with the idea that Congress understood that lands within the claimed limits of a foreign grant were reserved lands. The 6th section provides: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of the lands appropriated, under the authority of this act, or *reserved* by *competent authority*, and excepting *also the lands claimed under any foreign grant or title*, and the mineral lands, shall be subject to the pre-emption laws," &c. If the word "reserved" had been understood as including lands claimed under a foreign grant, the clause that immediately follows—"and excepting *also* the lands claimed under any foreign grant or title"—would have been omitted. It was unnecessary and useless. The fact that it was inserted is satisfactory proof that it was deemed material, and that without it "lands claimed under any foreign grant" would not have been excluded, in the opinion of the law-making power, from pre-emption filings.

Congress, in its legislation in regard to the public lands of California, seems to have studiously avoided using the word "reserved" in such a manner as to make it reasonable to construe it as including lands claimed under a foreign grant.

In the very important act of July 23, 1866, "to quiet land titles in California," (14 Stat., 218,) it provided for the confirmation of certain selections made by the State, but provided that no selection should be confirmed, "to any lands which had been *reserved* for naval, military, or Indian purposes by the United States, or to any mineral lands, *or to any land held or claimed under any valid Mexican or Spanish grant.*"

And this has not been accidental. It has all along understood the use of words, and has been able to express its meaning clearly in regard to Mexican claims. In its legislation for New Mexico, it provided, touching Mexican grants, that "until the final action of Congress on such claims, all lands covered thereby shall be *reserved* from sale or otherwise disposed of by the Government, and shall not be subject to the donations granted by the provisions of this act." (10 Stat., 309, Sec. 8.)

The grants to the railroads running to the Pacific were intended to be liberal in character. Especially is this true of the grant of 1864. It should receive a reasonable construction and not be frittered away by nicely-drawn distinctions. Giving it such a construction I am unable to declare that the lands in controversy were excepted from the grant. I prefer rather to follow the decision of the Circuit Court of the United

States in California, in the case of Sanger v. Sargent, and of the Supreme Court of that State in the Central Pacific R. R. v. Yolland, both recently made, and hold that they are included in the grant, and thereby return to the ruling that prevailed for many years in this Department, and was changed by my immediate predecessor, and followed by me upon the authority of the opinion of Attorney-General Akerman.

I reverse your decision as to all of the defendants except M. H. Boothby, and as to him I affirm the same, and herewith return the papers transmitted with your letter of Dec. 3, 1874.

Very respectfully,

C. DELANO, *Secretary.*

To the Com'r of the General Land Office.

STEWART vs. W. P. R. R. CO.

The act of March 3, 1853, to extend pre-emption rights to certain lands therein mentioned, did not apply to California, and the act of same date to provide for the survey of the public lands in California did apply, and excepted from the provisions of the pre-emption act "lands claimed under any foreign grant or title."

Land within the limits of a Mexican grant afterwards rejected were not thereby reserved from the grant to a railroad company.

In this case, before such rejection, the land was withdrawn for the benefit of the road and protected against pre-emption settlement, and as the pre-emption claimant could not make legal settlement until after the rejection of the grant, *Held*, That the land went to the railroad.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., *July* 15, 1875.

SIR: I have considered the case of Robert M. Stewart *vs.* The Western Pacific Railroad Co., involving the right to E. ½ of S. E. ¼, S. 21, R. 3 N., T. 6 E., M. D. M., Stockton district, California.

The land is within the limits of the withdrawal of Jan. 31, 1865, for said road, the line of which was definitely located past this point in April, 1868.

Stewart filed D. S. Nov. 9, 1865, alleging settlement Oct. 15, 1855.

Township plat was filed Oct. 18, 1865. The tract is within the limits of the Moquelamos Mexican grant, which was rejected by the United States Supreme Court Feb. 13, 1865.

This is a case similar to that of this same railroad company *vs.* Dillingham *et al.*, decided by me May 14th last. In said decision I held that the act of March 3, 1853, (10 Stat., 244,) to extend pre-emption rights to certain lands therein mentioned, did not apply to California, and that the act of same date (10 Stat., 244) to provide for the survey of the public lands in California, &c., manifestly did and excepted from the provisions of the pre-emption act "lands claimed under any foreign grant or title." (Sec. 6.) I further held that lands within the limits of a Mexi-

can grant afterwards rejected were not thereby reserved from the grant to the railroad company.

Following the principles established by that decision, Stewart could not make legal settlement until after the rejection of the grant. Before such rejection the land was withdrawn for the benefit of the road and protected against all pre-emption settlement. The land, therefore, has been continually protected against Stewart's settlement and claim, and he could acquire no right thereto. I am, therefore, compelled to reverse so much of your decision of Dec. 16, 1874, as is adverse to the railroad company.

The papers in the case transmitted with your letter of March 30th last are herewith returned.

Very respectfully,

C. DELANO, *Secretary.*

To the Com'r of the Gen'l Land Office.

Nov 27/75

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

G. D. NEWHALL
vs.
CHAS. W. SANGER. } No. 503.

Brief on behalf of Appellant

This case comes up on appeal from the circuit court for the district of California dismissing the demurrer of the plaintiff, (defendant below) to a bill in equity filed for the purpose of setting aside a patent issued to him as a settler under the land laws of the United States, by the holder of a prior patent in favor of the Western Pacific Railroad Company, under the acts of 1862 and 1864, known as the Pacific Railroad acts.

The only question presented upon the merits is whether the land in controversy was or was not included in the grant to the corporation. A question of jurisdiction might perhaps be maintained; as there was, doubtless, a good and sufficient remedy at law, by action of ejectment in the usual manner, and we might fairly demand why the extraordinary powers of a court of equity are sought to be brought into requisition, contrary to the long and wisely established usage, which forbids such resort until the legal remedies have proved inadequate for relief. But we find the case here, and elaborately argued by the re-

spective parties, without any plea to the jurisdiction, so far as we are informed by the record.

The whole matter rests upon a single point, to wit: the status or condition of the land respecting its relation to the public domain of the United States at the date when the lands granted became subject to the rights of the railroad company; for, if it was at that date public land, not sold or otherwise appropriated, nor reserved by competent authority, and not held by pre-emption or other lawful claim, it is conceded that it passed by the grant; as it does not fall in any manner under the designation of mineral land.

The record of the case discloses that this tract is within the limits of the railroad grant; that it was withdrawn from market pending the decision of this court at the December term, 1864, rejecting the alleged Moquelamos or Pico grant grant, embracing this among other tracts—the claim having been regularly presented to the Board of Land Commissioners under act of March 3, 1851, and having duly proceded by appeal to its final settlement here, on the 13th February, 1865, of that term.

By this withdrawal of 30th January, 1865, it is claimed by the company that its right attached to the land, and that, having complied with the requirements of the acts making the grant, the right then acquired by designation of its route and the withdrawal under the seventh section of the act of 1862, has ripened into perfect title, evidenced by the patent received from the land department in 1870.

The plaintiff on the other hand contends that the land embraced within the claimed limits of a Mexican grant at the date of the location of the road had not at that date become a part of the public domain of the United States, so as to pass by any grant of public lands generally described, but were held in reserve by force of the provisions of the act of March 3, 1851, section thirteen (Stats. 9, p. 631), until the final rejection of such claim; that they

could not so pass at the date of such location, and not afterward; for, if the grant acquired precision and attached to particular lands at a certain date, nothing not of the description granted could by any possibility thereafter attach, by reason of coming within the description at a subsequent period.

Having been denied a hearing below, on the authority of a previous case (Sanger *vs.* Sargent) elaborately argued and fully discussed in the opinion of the Court, he now comes here and prays for a review and reversal of the action had prejudicial to his interests and, as he believes, of his rights in the case.

The argument already filed thus far has mainly or entirely proceeded upon the assumption that the subject-matter of the controversy is clearly and unequivocally embraced in the language of the grant by the third section of the act of 1862, and, if excluded at all, is only excluded by the exceptions noted in that act and in the fourth section of the act of 1864, modifying and enlarging the grant. This, we submit, is not the main point of the plaintiff's case; for, while we believe it must be fairly held by this Court that a proper construction of the excepting clause does embrace private claims in California awaiting decision, as actual reservations, we claim upon the authority and proper construction of the act of March 3, 1851, that the lands in the condition stated, are not public lands in the sense intended by Congress in granting the public lands for railroads, or for any other purpose; and that it was never thought that a general statute of appropriation of public lands as such, would take hold of these lands, or affect the status of the claims pending for settlement in any matter whatsoever.

It need hardly be observed that the territory had been acquired in 1848 by treaty of Guadaloupe Hidalgo; that the State had been directly admitted into the Union without any territorial government having been established, and

that considering the complexity of political, civil and social affairs, no attempt had been made to extend over her the land system of the United States. It was in no proper sense public domain, so far as respected the lands occupied by the Government, occupied as they were by a drifting, inchoate population, seeking throughout all the region, not for homes and farms and productive settlements, but rushing madly and wildly from point to point in the eager search for gold. Private rights were hardly respected; titles were mere possessory shreds upheld by armed vigilance; public rights were but the changing law of the incongruous multitude. For nearly three years this condition prevailed. At length Congress assumed the preliminary work of bringing this confusion to rest and of extending over the lands the great land system of the country. How was the result effected?

Upon the very threshold of inquiry came the question of the titles previously acquired in the soil, and the necessity of providing for their security as stipulated in the treaty. The act of March 3, 1851, Stat. 9, page 617, provided a fund with which to begin the transformation, and established at the outset a clear foundation and distinction by which to designate and distinguish the class of lands now under consideration, and to keep them separate and disintegrate from the *public lands*. The item is as follows: "For surveying the public lands and private land claims in California, in conformity with the provisions of the acts of Congress authorizing similar surveys, twenty-five thousand dollars." Much stress has been laid in the argument and decision below, upon the later act of March 3, 1853, hereafter to be discussed, in that "the lands claimed under any foreign grant or title" are contradistinguished from lands "reserved by competent authority;" and the point is raised that they cannot be included in the term "lands reserved" in the railroad acts, because thus severed in this statute. We desire to note the language of this first land

law for California, which has, in precisely the same manner, severed the "private land claims" from "public lands." We desire to note further the manner in which this appropriation is to be used, viz.: "In conformity with the provisions of the acts of Congress authorizing similar surveys"—thus connecting the land system about to be introduced in California, in this especial matter of private claims, with the existing system in the other States, where it is conceded these claims pending their final adjustment have always operated to create reservations of the lands embraced in their exterior boundaries. It is clear from the foregoing that the land system was not intended to remain one thing for California and another for the rest of the United States; but that the extension of the laws over that State was begun in exact accord with the provisions of existing laws, and the proceedings are designated at the outset as "similar surveys."

We come now to the later act of the same date, Stat. 9, page 631, which, after establishing a tribunal of exclusive jurisdiction, with power to receive and adjust claims for a period of three years, and providing for successive appeal to a final decision in this court, provides:

SEC. 13. "That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided," that is not appealed to the district court; "or which shall be finally decided to be invalid by the district or supreme court," including two classes of cases, those not appealed beyond the district court and those brought here for decision, "and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States," &c.

It is only necessary to analyze these provisions to determine the exact time when any class embraced therein passed from the condition of a *de facto* or possible private

claim, to that of a "part of the public domain of the United States," and thus liable to pass by the general description "public lands" used in the railroad grant.

The first class upon the final rejection by the commissioners. The second class, upon the final rejection by the district court. The third class, upon the final rejection by the supreme court, which includes this case. The fourth class, comprising the great body of unclaimed lands in the State, upon the expiration of the period of limitation two years from the date of the act.

It has been suggested that the construction claimed here is "an absurdity," in that it includes all the lands in California, and holds them reserved for two years. We have previously shown that the lands had already been nearly three years outside any land system whatever, and that this is but the beginning of their subjection to that system. Two years was but a short period in that excited time and locality to bring order and system out of chaos. Oregon, settled by quieter, slower and more regular methods, waited after her territorial organization in 1848, until September 27, 1850, before she was favored with any land system whatever. See Lowndsdale *vs.* City of Portland, 1st Deady, 1. She then received the donation law, and it was not until July 17, 1854, nearly four years afterward, that the general pre-emption and land laws were extended to her. But without citing precedents or other example, it is sufficient to say that the statement is literally and historically correct; and that Congress itself respected its own limitations, and waited precisely two years before taking the necessary steps to open the vast domain that day released by operation of the previous law, to settlement and pre-emption on the third day of March, 1853. It will prove an ill attempt to whistle down the wind by the cry of "absurdity," a fact standing attested by the legislation of the American Congress, patent to all observers, by the

merest and most cursory comparison of dates, without further examination.

It may here be properly remarked that the observance of the most indifferent and ordinary good faith under the treaty, required this very proceeding with regard to the lands acquired. The State had been hastily overrun by the wild rush of fortune hunters and pioneers, and no opportunity had been afforded for inquiry respecting the location or extent of the private claims of citizens. Nothing but the great ranchos was secure from unceremonious intrusion, and even they were frequently and persistently squatted upon, to use a settlers' phrase, and held for present gain or future speculation by the mere tenure of forcible possession. Congress could do no less than hold back the general laws until private rights could be legally asserted; and upon looking at the fact that such action was had, we are bound to construe the language in which its will was expressed according to its plain natural import; giving the words their usual sense and signification, without inference where the language is clear, and without resort to reasons for forced interpretation. We submit that the act of 1851 could not more clearly state the limitations quoted; that the words import a future sense, dependent upon the fulfillment of the conditions; that no other construction would naturally occur to ordinary minds, and that the facts verify the conclusion that Congress itself understood the statute to be binding against future complications for the period prescribed. No fact can be derided as incredible or absurd, and nothing could be clearer than the facts attendant upon this legislation; and the whole go to show that these lands were not properly public domain for disposal under the land system till the respective periods named for each class, which time upon the lands involved in the Moquelamos claim was not until finally rejected by this court, February 13, 1865, subseqent to the withdrawal for railroad purposes.

And, fortunately, we are not left to mere dictum and abstract reasoning for the establishment of the point in issue. That ground has already been examined and passed upon by this court; and its interpretation has, as if in anticipation of this very case, been made of record, and the opinion has been clearly formulated and made up in a statement so concise, full, and comprehensive as to resolve all doubt, could any exist, upon the language of the act of 1851. In 9th Wallace, page 192, case of Frisbie *vs.* Whitney, Mr. Justice Miller, of this tribunal, in rendering the opinion, said: "The proposition is, that as soon as the decree of the Supreme Court was announced declaring the Vallejo claim invalid, the land covered by that claim became public land, subject to the operation of all the laws by which the actual settler could secure title to such lands" (*i. e. public* lands); and after noticing the suggestions of the objectors to this view, on account of the land being unsurveyed, and also suggesting doubts upon the right of a pre-emptor to secure a foothold on the improvements of an actual occupant in possession, by acts of trespass, as had been done in that case, the opinion proceeds to say that, "in the view which the Court takes of the matter, it may be assumed that the lands were open to pre-emption."

Not one word is here said or doubt intimated militating against the doctrine of the clear proposition stated in exact terms by the court as to the *time when* these lands "became" for the first time "public lands," so as to fall under the operation of the land laws. The court seems to have had no second thought upon that point. It was "as soon as the decree was announced declaring the Vallejo claim invalid;" following literally the act of 1851, directing that "all lands the claims to which * * shall be finally decided to be invalid by the district and supreme court * * shall be deemed, held and considered as part of the public domain of the United States." The state-

ment conclusively settles what we have just said; that there is but one meaning in that act, clearly and concisely expressed in words presenting but one suggestion to ordinary minds, needing no interpretation to explain their plain intent, and requiring no labored construction to convey their evident and exact signification. This the court seems to have well understood; and after thus stating the case appears to have proceeded without further ado to the consideration and decision of the real point involved in that issue, which was simply the question whether or not the pre-emption laws secured to the party claiming under them a vested right against the Government.

In the case of the United States *vs.* Sutter, 21 Howard, 171, the jurisdiction of the courts is held to attach, as to location and boundary "until the issue of a patent in conformity to the decree," thus holding exterior boundaries in reserve until the segregation of a confirmed portion is rendered irrevocable by the actual transfer of the complete title.

Having thus concluded the main question, we proceed to examine the further statutes introducing the land system into Calfornia, in order to ascertain whether anything therein operates in the most remote degree against the case made out.

The act of August 31, 1852, (Stats. 10, p. 90) is next in order, and like the first act of March 3, 1851, reaches into the ensuing year, and merely provides funds for the legislation evidently contemplated, to wit, the extension of settlement rights as soon as the time fixed by law should expire, and for the prelimary survey of such lands as would soonest be needed for settlement in that event.

It is hardly worthy of special mention as bearing upon a proper construction of this case, unless it may assist in settling a point which seems to trouble somewhat the counsel for the railroad interest, as to whether all these terms

of description applied to private claims in California, should not be construed to mean strictly *lawful claims*. It will be observed that this act authorizes the survey of *unconfirmed* private claims, which it will not be necessary to say must include some *unlawful claims* when subjected to the scrutiny of the legal tribunals. And this point being established, some enlargement of the technical views and limitations ascribed to this legislation for the land system of a great sister State of the Union, may possibly result.

We come now to the acts of March 3, 1853, two in number, (10 Stats. 243 and 244,) the latter of which provides especially for the introduction of the general land system into California, and the former of which is general in its terms, and is intended, as its title imports, "to extend pre-emptions rights to certain lands therein mentioned."

It has been claimed that this statute has no reference to California, and that even if it be of general application, it is repugnant to, and must yield to the later act of the same date, designed especially for that State, in respect to the rights conferred by it. Let us examine for a moment its provisions, and discover, if possible, whether there be in it anything not applicable as well in California as elsewhere. It prescribes, first, "that the pre-emption laws of the United States, as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by acts of Congress." It then fixes the price of such lands and makes definite regulations respecting them by way of proviso, and then provides further, "that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish, or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of 1841, entitled, "An act

to appropriate the proceeds of the public lands, and to grant pre-emption rights, after the lands shall have been released from reservation, in the same manner as if no reservation existed."

At that date no lands had been granted for railroads in California, consequently the main statute could only reach the State by the words "or may be granted by act of Congress." But the extension is to the "lands along the lines all the railroads in the United States," and was designed to repeal, in general terms, the restriction theretofore governing the pre-emption laws, (see act of 1841, sec. 10.) and to apply wherever the pre-emption system had been, or might be introduced. There is no exception of California, or any other State or Territory. It, on the contrary, reached "all the railroads in the United States wherever public lands have been, or may be granted." Surely this provision has no special limitations.

How is the proviso limited? It extends to all lands theretofore reserved on account of claims under French, Spanish or other grants pending in the courts, and liable to rejection by the Supreme Court, as well as those already rejected. It evidently relates to a general subject, and embraces particular class of lands always treated as reserved by a particular policy, and was simply designed to open to pre-emption without the formality of an express act of Congress in each case all lands of the class mentioned, that without such action would remain indefinitely reserved after the occasion and reasons for their further withholding should pass away by the rejection of the claim which covered and excluded them from disposal, and which exclusion almost, if not universally, continued until removed by Congress. If any lands of that class were found in California, the act would operate upon them after the release from reservation as well as in any other State. The provision is general, and extends anywhere that the pre-emption system extends. It is simply begging the question

to say that there were no such lands in California, and, therefore, Congress would not have intended the act to extend to California, and, in the same breath, to say that the act did not extend to California, and, therefore, could apply to no lands in that State. Yet this is the argument resorted to in the case decided below. The reasoning revolves in a circle, and we must seek its point only in the center; and the central point is this, that it becomes necessary to do away by special evasion with the strong, general implication of a reservation of this class of lands conveyed by the language of the statute—a reservation existing under a leading feature of the land system, introduced in some form, more or less explicit in all the acts, for the adjustment of private land claims from the beginning; a necessity, in fact, of the system itself, without which interminable and inextricable confusion would result, and the disregard of which, though error, mistake, ignorance, and imposition, in the admission of entry under the public land laws upon these reserved claims, has wrought more complications in their adjustment than all others combined.

Further on we shall discuss more definitely the idea here broached, relating to the effect of a well defined public policy as recognized in the land system. We leave it for the present to review briefly the remaining act of March 3, 1853, providing for the survey of the public lands in California and the granting of pre-emption rights therein. 10 Stats., 244.

This act, while extending the land system to the State and providing for pre-emption of the public lands, carefully excludes from every species of disposal named in the law, all lands "claimed under any foreign grant or title," and the counsel for the railroad interest insists that the words must mean "lawfully claimed."

If by this we understand claims presented in a lawful form under the act of 1851, the suggestion is undoubtedly correct, but we do not apprehend that any ad-

ministrative officer, in view of the plain prohibition of the statute, would authorize or pass to patent a pre-emption entry upon lands claimed under any foreign grant pending the settlement of such claim by this court, whether lawful or unlawful in the strict legal sense of the word. This act does undoubtedly exclude from pre-emption all lands claimed as above, and we maintain that it does not thereby limit or conflict in any manner with the previous act of the same date just discussed, but the rather enforces it by making more specific the reservation recognized on account of the private claim. The one positively excludes pre-emption upon such lands. The other recognizes the exclusion as amounting to a reservation from the operation of the land laws, and at once extends the pre-emption privilege over the tract after the release of such reservation when the land is no longer subject to the claim. They are not repugnant, nor in the slightest degree inconsistent. They are to be construed *in pari materia* as elements of the great pre-emption system, and in harmony, we repeat, with the general provisions and principles of that system in or out of California.

The California statute is simply the further declaration of the policy everywhere prevailing of creating a particular class of lands out of private claims awaiting adjustment, and of treating those lands as set apart for the satisfaction of the private title, existing in them whenever such titles can be definitely examined and ascertained.

These two acts are both annunciators of that policy and speak the same language respecting it. The one reaches beyond the other, becomes general in character, and does away with the necessity of providing, in the California act, for the further treatment of the lands after they should pass from the reservation under the act of 1851, and become public lands by the rejection of the private claim?

It subserves another purpose. It vests in the settler upon these lands a springing interest, not amounting to

a pre-emption right, but ripening into one immediately upon the rejection of the alleged private grant, and declares that such settlement shall not stand charged to the party as a trespass against the United States in that event, but shall be so far regarded as lawful as to secure the recognition of the law the moment it ceases to be a trespass upon the rights of the individual claimant. It saves him from the danger of losing his improvements by award to a subsequent settler who, watching for the moment of rejection, goes immediately thereafter upon the land, and seeks to obtain them through the disability of the first occupant to allege that his claim was made for the purposes of pre-emption. And this construction and application of the law have been constantly recognized and acted upon by the land department of the Government, in California and elsewhere, ever since its enactment. At the date of the rejection of an alleged private grant all settlers found upon the land who could lawfully acquire pre-emption rights, have been considered as equal in right so far as relates to date of settlement; priority has been held to run only from the date of such rejection, and equitable division and joint entry for the purpose of adjusting coterminous boundaries, have uniformly been permitted and required in the adjustment of pre-emption conflicts based upon this statute. Long and familiar acquaintance with the usages of the department enables us to speak with certainty in this matter.

We think we have thus shown that whatever bearing the acts of 1853 have upon this question, they are in entire harmony with each other, and with the prior legislation of 1851 and 1852, as well as with the whole land system of the United States.

We wish to call attention to one further point in the third section of the act of March 3, 1853, coinciding with the earlier laws, and that is the repetition of the phrase, "the public lands and private claims," and to urge once

more that if the separate designation of the "lands claimed under any foreign grant or title" in the sixth section contradistinguishes them from "lands reserved by competent authority" as claimed by the defendant, which assertion, by the way, constitutes nearly the whole of his case, the repeated separation of the "private claims" from the "public lands" by distinct and consecutive designation must at least create an equal presumption that the one was not intended to include the other, and that they do in fact as urged by him, constitute a class by themselves, of which it is only necessary to inquire the status to dispose of this entire question. And we claim that if he once establishes the fact that they are such class, by the proof he presents from the construction of the statute, much more do we establish the same fact of a class distinct from public lands by exactly similar proof *thrice repeated;* and if not *public* lands, it matters not whether reserved or no, they do not pass by the railroad grant, which only calls for "public lands" at the date of the definite location of the line. To this proof we add the act of 1851, distinctly prescribing the date and conditions upon which they are to become public lands, and the clear, unambiguous, statement of this court in the case cited touching the Vallejo claim.

We only propose to glance, in conclusion, to some considerations of public policy, and to some authorities bearing thereon, to show that this case is not governed by narrow, technical construction, which would reduce the land system of the United States to a bundle of local laws, and special enactments; but that the laws touching any particular matter must be construed to produce harmony rather than conflict, and to accord with rather than to depart from established usage and principles.

In this view it may well be said that less particularity may be required to fix the status of a tract of land, and to restrict its disposal when it falls in a class well-defined by

previous laws, and concerning which a long line of settled and unbroken practice has created a distinct and uniform policy. So this court held in a late case, Morton *vs.* State of Nebraska, respecting salines and saline lands, involving this identical question of reservation by obscure and ambiguous language and implication in a statute. And we submit that the present case is far more clear, and governed by a public policy much more uniformly shown by reference to all the legislation on the subject, than the case cited. And the reasons for the policy in this case are much more imperative and controlling. There the question was one of gratuties, in aid, it is true, of beneficent objects, but still capable of satisfaction by other measures. Here the protection of private rights under treaty obligations *demands* of the government, security, satisfaction and a peaceable and speedy adjustment. How can this be effected if no reservation is made of the subject matter of the claim while inquiry is had respecting its ownership? How can this be effected if the act of confirmation finds the claim all covered over with houses and farms and evidences of possession and ownership, through failure of the Government to hold back the general land laws, including railroad grants, from the lands? If there be, in fact, no reservation, why delay any disposal of the land whatever?

Every consideration of reason and of justice points to the propriety of treating these lands as reserved from the operation of the land laws; and the uniform practice of the Interior Department has conformed to the policy and, as we claim, obeyed the law which demands that they be so held. If, in any case, lands so claimed have been thrown open for disposal, it has been through ignorance of the pendency of the claim, or mistake as to its location. There are no floats among these claims. They are satisfied "in place" by survey and patent. They are in this regard far better defined and more capable of reservation than the

old Louisiana claims which have been largely floated—yet all the old laws make reservations of every located claim; and, as we have before urged, all the laws, wherever private claims are recognized in the United States, will, we are confident, be found to express in some manner, more or less explicit, an intent to reserve the lands claimed from disposal until after such claim has been examined and set aside, or satisfied. This point seems to be conceded by the defence, except in the State of California, where, as we have shown, the greatest necessity for such reservation exists; and we again inquire why forced interpretations and far-fetched explanations should be resorted to here, to show that an exception is found in the case where reason, justice and policy alike require that the implication should, if necessary, be forced in the other direction? But it is not necessary. The laws of Congress, the action of the Department, the judgment of this Court, and the universal opinion and understanding of the people of California and of the United States, have so defined, marked and identified the status of these lands as set apart and appropriated to the satisfaction of these claims, and reserved from all disposal until final action upon them, that it is simply surprising that after the lapse of nearly a quarter of a century from the date of the act providing for their adjustment, we should meet a decision of high legal authority, invoked by a powerful corporation, bountifully enriched by the lands and bonds of the people, so radically at variance with the well settled practice and construction heretofore understood and accepted.

We respectfully submit that these are not of the lands intended for this corporation. They are the homes of the people, the substance of the country; rich in improvements and cultivation and production; old in settlement, neighborhood and association, almost venerable in the history of the civilization of that wonderful region. They are not of the virgin public lands, requiring the ax and the rifle of the pioneer, the log cabin and the humble

spade, the subduing labor of the forester and the slow tread of the hunter and the woodsman. Let us not talk of the justice which requires for the satisfaction of the grant, the despoiling of these homes. Let us not invoke the equity that will, under cover of technical construction, appropriate these improvements. Let us rather fairly weigh the words in their simple sense, be guided by their plain import, study their intent, and, if strictly and legally they carry this right to the company, let it be so said, honoring the law, though by its enforcement thousands are made penniless.

All of which is respectfully submitted.

U. J. BAXTER,
WM. J. JOHNSTON,
For the Settlers.

NOTE.—The case above has been treated upon the assumption that the right of the corporation took effect upon the granted lands at the date of the withdrawal, after the filing of the map of the general route under the 7th section of the act of 1862. It may not improbably be held by the court that the true date of the attachment of the grant was upon the survey and fixing of the definite line of the road in 1868. If so, this particular case must fail; as the foreign claim was extinguished prior to such definite location, leaving the lands confessedly public domain at that date. But the question here presented, whatever be the date taken, is of the highest interest to every settler in California upon this class of lands, and its proper settlement will operate upon multitudes of claimants upon other imperfect grants whatever may be the result in this case. We offer this suggestion in order that the particular point involved in it may not escape attention; although we have followed the argument in the case upon the assumption that seems to have governed its presentation, that the grant did attach at the date of withdrawal.

Nov. 27/45. M. H. Dwayne

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1875.

G. D. NEWHALL
vs.
CHAS. W. SANGER. } No. 503.

Brief on behalf of Appellant.

CASE.

The question which the parties to this suit pray the court to decide, may be thus stated:

By the third section of an act of Congress, approved July 1, 1862, (12 Stat. at Large, 492) there were granted to certain railroad companies, of which the Central Pacific was one, certain alternate sections of the "public land" "not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Numerous claims to lands, based upon asserted grants from the governments of Spain and Mexico, and guaranteed by the Treaty of Guadaloupe Hidalgo, had been presented to the tribunals of the United States in accordance with the provisions of the act of March 3, 1851, "to ascertain and settle private land claims in California,"

(Stats. at Large, vol. 9, p. 631); and having been confirmed by the Land Commission or the District Courts, had been subsequently rejected by the Supreme Court, upon appeals pending at the date of said railroad act, and pending at date of the definite location of the roads named therein.

Were lands within the claimed limits of such private land claims, *sub judice* at date of the Railroad Grant and at date of the definite location of its route, reserved within the meaning of the railroad acts; or did they constitute a part of the unreserved "public land" and pass by relation to the railroad company when the route of its road was definitely fixed?

The decision of this question will determine the titles to large bodies of lands in California, and either confirm or oust the possession of thousands of people. The same issue is being litigated along the routes of each of the railroad grants in that State. Until May, 1875, the Interior Department uniformly treated these lands as "reserved," and the townships included in each grant claim were embraced in special Executive orders of reservation. By repeated decisions of the Secretary of Interior under advice of the Attorney General they were held to be excepted from the railroad grants; if judicially undetermined at date of definite location of the roads, and when subsequently decided to be free from incumbrance of treaty claims, they were held to *then* fall into the mass of public lands and to be thereafter subject to ordinary disposition and sale. Under this established Executive practice these lands have been sold by the United States to individual purchasers and patents have duly issued during a long term of years. Such individual purchasers may be thus classified, viz:

1. Settlers under the general pre-emption and homestead laws. Within this class falls the present appellant, and his case is fully presented by his counsel.

2. Claimants under 7th section Act of Congress, approved July 23, 1866, (Stats. at Large, vol. 14, p. 220).

This section, with sundry limitations, gives a preference right to purchase, after survey and at the minimum price, to persons who, "in good faith and for a valuable consideration have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant," and where such purchasers "have continued in the actual possession of the same as according to the lines of their original purchase."

We represent this class of purchasers, whose possession under claim of grant title, by themselves or their grantors, obviously extends back to a date anterior to the American conquest. Within this class falls the case of Sanger *vs.* Sargent *et al.*, wherein the Circuit Court on 16th September, 1874, in overruling demurrer delivered its leading, and practically, its only decision upon present issue. Answer has since been filed, and upon trial had, proofs introduced to show occupation of the premises, Executive orders of withdrawal, date of definite location of the railroad, acceptance by Commissioners, &c., &c. Appeal will soon reach this Court upon a record, which will disclose all the facts necessary to a full and intelligent decision of the entire controversy. Several other causes are now pending in the Circuit Court of the Ninth Circuit for the District of California, and in the Courts of the State, and which causes will come to this tribunal for ultimate decision. Under these circumstances we submit, with great deference, that the principle involved should not be passed upon in this case, and upon a record so conspicuously barren in proofs of necessary facts, unless said principle is clearly presented by said record.

ARGUMENT.

I.

We most respectfully urge that the question does not arise in the record of this case.

The complainant in his bill avers:

That the Western Pacific Railroad Company having complied with all the provisions of the Act of July 1, 1862, and of the Acts amendatory thereof and supplemental thereto, became entitled to the lands in controversy; and that accordingly the President of the United States on the 9th of April, 1870, issued a patent for this land to that corporation, and by proper mesne conveyances the complainant had succeeded to all the rights which passed by said patent to the Railroad Company; that "subsequent to the issuance of the patent" under which the complainant derives, the President issued a patent to one Ransom Dayton, in which "it was recited that a patent had issued by mistake to the Western Pacific Railroad Company, and that it was because said land was within the exterior limits of a Mexican Grant called Moquelamos, which said grant was rejected by the Supreme Court of the United States in the December Term, 1864, and before the reservation for the railroads in said Acts of Congress mentioned; that the President of the United States pretended that the rejection took place in February, 1865, which said day was after the reservation for railroad purposes;" that the defendant is in possession of said land and "sets up some title thereto, and that the claim of defendant is a cloud upon complainant's title and greatly injures the value thereof."

Upon this showing the complainant has a complete remedy at law in the action of ejectment. The legal title passed to him by the senior patent. The defendant is in possession, but holds under a junior patent, which recites

the prior patent of same land to complainant's grantor. Obviously if *defendant* took anything by virtue of the facts recited in his junior patent, his rights are of equitable cognizance, and must be asserted in that form.

Meador *vs.* Norton, 11 Wall., 442.

Not so with the complainant not in possession, but holding the senior patent. To maintain his bill, the Court must sustain an "ejectment bill," which is always demurrable.

1 Story's Pleading, 476.

From the charge in the bill that "the claim of defendant is a cloud upon complainant's title, and greatly injures the value thereof," we may infer that the pleader intended it to be a bill to quiet title.

If so, he has failed to set forth any of the conditions under which a bill of such nature can be sustained. By the practice of Courts of Chancery a bill of peace will not lie, unless the complainant's "possession had been disturbed by legal proceedings, in which his title had been maintained;" or where his right is "controverted by numerous persons, holding distinct and separate interests depending upon a common source."

Curtis *vs.* Sutter, 15 Cal., 262.

Stark *vs.* Starrs, 6 Wall., 409.

The statutes of California have enlarged the class of cases in which relief is granted by dispensing with the previous establishment of the plaintiff's right by repeated judgments.

Curtis *vs.* Sutter; Stark *vs.* Starrs, *ubi supra.*

Central Pacific R. R. Co. *vs.* Dyer, 1 Sawyer, 649.

This innovation upon the practice in Chancery is permitted, because this enlargement of the jurisdiction is consistent with the forms of procedure in equity.

Clark *vs.* Smith, 13 Peters, 203, and the cases above cited.

If it should be said in reply to this reasoning, that by the practice of California, "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," (Code of Civil Procedure, Section 738,) we answer:

That Chancery practice in the Circuit Courts of the United States is not controlled by the statutes of States. Thus: whilst a remedy or right in equity may in some respects be enlarged or simplified, (as already shown by cases cited,) it is not in the power of a State Legislature to engraft upon equity procedure something foreign to its nature, as would result could such Legislature authorize or compel a Court of Equity to try an action of ejectment.

We submit that the Circuit Court erred in not sustaining the demurrer and dismissing the bill.

II.

But if we are overruled upon above point, then we submit upon the main question the following general propositions, as supplemental to the more detailed argument heretofore filed for appellant, and as illustrative of the extended interests concerned in the principle involved.

1st. The record does not disclose, either by expression or by implication, (as assumed by counsel for appellee,) the date of definite location of the railroad route, as being "between the first day of the December (1864) term of this Court and the 13th day of February, 1865" Such definite location is a material fact which to be treated as admitted by the demurrer, should have been affirmatively set forth in the bill. From no recital therein can such definite location be even assumed, except possibly as being at some date anterior to complainant's patent, viz., April 9, 1870, and subsequent to the Act of Congress of March

3, 1865, which confirmed the assignment by the Central Pacific to the Western Pacific. But for a precise date from which to argue, we are remitted by the bill to the date of withdrawal.

2d. These lands are admittedly within the geographical limits of the railroad withdrawal. Why not, then, within the legal effect of that grant? Because they are in terms excepted therefrom. The original Pacific railroad act of July 1, 1862, in the third section grants within specified limits every alternate odd section of "*public land* not sold, reserved, or otherwise disposed of by the United States." The amendatory act of July 2, 1864, in the fourth section enlarges the grant, with the further limitation that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands," &c. It is conceded that the withdrawal of lands for the Western Pacific Railroad Company, dated January 31, 1865, took effect on such odd numbered sections, within its lateral limits, as were, at the date of withdrawal, *public lands not reserved;* but we contend that lands included at date of withdrawal, (or of definite location,) within the claimed limits of a Spanish or Mexican land claim *sub judice* were not "public lands," and were "reserved" within the meaning of the statute; and that when subsequently released from such reservation by final rejection of the alleged Mexican or Spanish grant, they reverted to the United States and not to the railroad grant.

3d. We respectfully submit, that the views of appellee are neither in accordance with precedent or reason. By his interpretation "public lands" embrace all lands to which the United States may ultimately prove to possess

full title; and the term "reserved" is restricted to a withholding for public uses, such as a fort or navy yard.

Per contra, we insist that the term "public lands," as used in legislative intent since the creation of our land system, are words of technical import, and refer only to such lands in the ownership of the United States, as are subject to disposition and sale under the general land laws; and that the term "reserved" is intended to designate any and all lands withheld by either legislative or executive authority, for any purpose whatever, from such disposition and sale under the general land system. The United States, for example, own certain vacant lots in the city of Washington, which are neither covered by public buildings, nor occupied for military or naval purposes, nor actually used by the Government for any special public use. Yet they have never been made subject to the general land system, and are not in the statutory meaning, "public lands;" and *therefore* they are not subject to settlement and purchase under the general townsite laws.

4th. Then in the restrictive, statutory meaning of the terms, were these lands "public lands not reserved" at date of the railroad grant and withdrawal?

If, as contended by appellee's counsel, the word "reserved," must be construed as applicable only to a withholding for arsenals, navy yards, public parks, or similar public uses, then the word was mere surplusage in the railroad act. The statute would then have perfectly effected its intended purpose if it had simply excepted "public lands not sold or otherwise disposed of." The latter phraseology would clearly have covered permanent government reservations, and the word "reserved" would have had no separate meaning. But in construing statutes a meaning must be attached to the words used, if possible; and that meaning should accord with the natural and most obvious import of the language, "without resorting to subtle and

forced constructions for the purpose of either limiting or extending their operation."

III.

1st. But if doubt can attach to the plain import of the word "reserved," then we are remitted to an ascertainment of the legislative intention. That will be best ascertained from a review of the state of facts upon which the legislative intent acted.

"The Government of the United States received the legal title to the public lands in California by treaty, and encumbered under the laws of nations, with all the equitable rights of private property therein, that they were subject to in the hands of Mexico at the time of the transfer."

Fremont *vs.* United States, 17 Howard.

"The United States did not appear in the courts as a contentious litigant, but as a great nation acknowledging their obligation to recognize as valid every authentic title and soliciting exact information to direct their executive government to comply with that obligation."

United States *vs.* Fossatt, 21 Howard.

"Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former goverment. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation."

Beard *vs.* Federy, 3 Wallace.

These extracts from Supreme Court decisions sketch boldly the facts and the policy applied thereto. The United States acquired California by the treaty of Guadaloupe Hildalgo, and stipulated to respect and to perfect all private property rights both legal and equitable. By the treaty of cession, as well as by the laws of nations, the United States were not justified in doling out a reluctant recognition of such asserted rights, nor in hedging them around with nice technicalities of strict law. The highest considerations of public policy dictated an adjustment of these claims in a fair and equitable spirit, so that the newly acquired citizens might be readily attached to the flag to which their allegiance had been transferred. And most especially was our Government bound by every principle of equity, pending an examination and adjustment of the treaty claims to land grants, to protect the claimants from trespass under color of authority from the United States. Otherwise, though the right of such claimants should be finally recognized, yet they might easily have been despoiled of its value by vexatious litigation or wasteful trespass. Yet, whilst thus guarding the treaty claimants, the United States were also bound to protect other citizens from unnecessary litigation, and the tide of immigration flowing from the eastern States could not be ignored. With this double duty in view Congress enacted the law of March 3, 1851, clothing a commission and appellate courts with jurisdiction to determine the validity of these treaty claims. By the 11th section thereof it required their decisions to be "governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages and customs of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable." And by the 13th section thereof Congress prescribed "that all lands, the claims to which have been finally rejected by the commissioners in manner herein

provided, or which shall be finally decided to be invalid by the district or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States."

Congress thus not only prescribed the equitable principles upon which such adjudication should proceed, but pending final decision guarded the alleged Mexican grantees from conflict with claimants under the United States. It said to them, "you shall have two years from this date in which to present your claims." During that time Congress omitted to extend to California any part or portion of the public land system, and the whole State was held subject to the filing of these treaty claims. When the claims had been so presented, their general location and extent was of course made known, and Congress then, for the first time, felt justified in initiating legislation for the disposition of lands entirely free from such claims. But commencing with the Act of March 3, 1853, and extending through every subsequent statute upon the subject-matter of Government lands in California, excepting words or clauses have been invariably inserted with the plain intent of reserving from the operation of the law or laws, lands within the asserted limits of these treaty claims *sub judice*. That such lands are not "deemed, held and considered as part of the public domain of the United States," is by plain implication the meaning of the 13th section of the act of March 3, 1851.

That has, until May, 1875, been the uniform construction in the Interior Department, and property rights have been adjusted by the Executive in accordance therewith for nearly twenty years. Such was the construction given to it by Attorney General Speed in his opinion of May 26, 1866, as to the Suscol Rancho, (vol. 11, p. 493,) wherein he says: "Pending the adjudication of the claim pre-

sented by Vallejo to the Board of Land Commissioners under the Act of 1851, the lands embraced by his claim were not liable to be dealt with as public lands of the United States. The statute of 1851 declares that all lands in California, the claims to which have been finally rejected by the Commissioners, or which shall be finally decided to be invalid by the District or Supreme Court, shall be deemed, held and considered as part of the public domain of the United States. When, therefore, the Supreme Court reversed the decision of the District Court, affirming the validity of Vallejo's claim to the Suscol Ranch, the lands embraced thereby became public lands and liable to be appropriated by Congress under its general constitutional power over the subject."

This opinion was commended and adopted by the Supreme Court at its December term, 1869, in—

Whitney *vs.* Frisbie, 9 Wall., 187.

See also opinion of Attorney General, of March 7, 1871, in the case of this same Moquelamos Rancho.

2d. In addition to the general statutory reservation of all lands of this class, it is a matter of official record in the Interior Department, that a special reservation of the claimed limits of the Moquelamos Rancho was made by Executive authority, September 21, 1864. The power of the Executive to so reserve is fully discussed and sustained in—

Grisar *vs.* McDowell, 6 Wall., 381.
Walcott *vs.* D. V. N. & R. Co., 5 Wall., 681.

This last case also expressly rules the identical point contended for by us, and its authority is conclusive. It has been reaffirmed in numerous cases by the Supreme Court.

3d. The doctrine is not novel to our statutes. The same

principle has been, from the foundation of the Government, embodied in legislation concerning lands covered by treaty claims, as will appear by reference—for instance, to the Acts of February 15, 1811, and of February 17, 1818, relative to lands in Louisiana. See also the other cases cited on pages 7 and 8 of Mr. Blair's brief.

IV.

Our position is then fortified by the uniform policy and legislation of Congress; by the time-henored practice of the Executive; and by a continuous current of authorities from the Supreme Court. For years antecedent to these railroad grants, vast property rights had vested in these Mexican grant claims. Pending final adjudication they had been divided and subdivided, sold and resold, and purchasers had expended time, energy and means in their improvement. They were to be found scattered along the line upon which the road solicited a grant from Congress, and they constituted the farms and homes of an enterprising class of agriculturists. Is it reasonable to suppose that Congress intended upon future failure of these grant titles, to confiscate the property of these innocent purchasers, and, in contempt of their equities to grant their possessions absolutely to the railroad company? Is it not a better construction to concede that the Government meant to to deal liberally with its own citizens; and with this view, purposely inserted the words of reservation in the legislative grant?

A. CHESTER,
A. T. BRITTON,
Of Counsel for Parties in Interest with Appellant.

NOVEMBER 15, 1875.

APPENDIX.

The statement of a few facts may properly raise an inquiry as to whether Sanger *v.* Newhall is a bona fide case:—such an one as should be made the test of a principle so important to thousands of people.

I.

"The case was submitted and decided without argument in the Circuit Court, because in a prior case arising on the same Mexican grant, the court had, upon full argument, decided the broad question in favor of the title of the railroad company. (See the case of Sawyer *vs.* Sargent, Circuit Court, District of California, September 10, 1874, Pacific Law Reports.)"

This quotation is from p. 2 of appellee's brief and its correctness is conceded, except that the case referred to is Sanger *vs.* Sargent.

II.

In Sanger *vs.* Sargent, Newhall appears as the attorney and agent for Sanger, and in that capacity signs and swears to the replication; whilst in present suit, Newhall appears as defendant against his principal in the Sargent suit, within the same grant and involving the same principle.

III.

Newhall has been through all these proceedings a clerk in McLaughlin's office in San Francisco, said McLaughlin being the original owner of the Western Pacific railroad franchise and the owner of most of its land grant.

IV.

The S. W. $\frac{1}{4}$ 31, 3 *S.*, 7 E., Mt. D. Base and Mdn, being the tract sued for, as per the printed record, does not fall within the claimed limits of the "Moquelamas" or "Moquelumne" grant. All of said grant limits fell *north* of the Base line.

V.

All of section 31, 3 *S.*, 7 E., has been patented to the railroad company without adverse claim by any party whomsoever, neither Ransom Dayton, nor any other party ever filed for, purchased, received patent or set up any character of claim to any portion thereof.

VI.

If, however, we assume that 3 *S.* is a clerical error, or a misprint, and that it should have been 3 *N.*, then the records of the General Land Office show that only the E. ½ S. W. ¼ thereof was patented to Ransom Dayton; that said patent contains *none* of the recitals set forth in the bill, and that same is the ordinary clear form of patent.

VII.

These facts can be established by a certified copy of the record in Sargent *vs.* Sanger, and by exemplifications from the General Land Office. This surprising confusion or misstatement of facts should be coupled with the celerity of motion which has enabled the recent case of Sanger *vs.* Newhall to anticipate the progress to the Supreme Court of the elder and leading case of Sanger *vs.* Sargent.

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